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Cleaning Up Jurisdiction: Divining Congressional Intent of Clean Air Act Section 307(b)

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Cleaning Up Jurisdiction: Divining Congressional Intent of Clean Air Act Section 307(b)

Kevin O. Leske*

In a span of five days in 2014, panels of the U.S. Courts of Appeals for the Tenth and Seventh Circuits reached opposite conclusions on whether certain limitations on judicial review found in section 307(b)(1) of the Clean Air Act were jurisdictional. Specifically, the courts disagreed as to whether the filing deadline and the venue rules implicated the courts' subject-matter jurisdiction.

The characterization of a rule as jurisdictional is far from semantic or academic. Whether a requirement is jurisdictional raises significant practical, doctrinal, and constitutional concerns. These issues include fairness, uniformity, and judicial efficiency, as well as fidelity to Article III of the U.S. Constitution and the sovereign immunity doctrine. Accordingly, this Article analyzes whether the filing deadline and the venue rules in section 307(b)(1) of the Clean Air Act are jurisdictional.

First, this Article distinguishes jurisdictional and non-jurisdictional rules. Next, it gives a background of the Clean Air Act and section 307(b), and discusses the various decisions by the U.S. Courts of Appeals to explain the key views on whether the limitations are jurisdictional. Finally, it applies recent Supreme Court guidance to assess whether the filing deadline and the venue rules in section 307(b)(1) are jurisdictional. By examining the text of the provision, its context, and its historical treatment, the Article concludes that: (1) the filing deadline requirement for judicial review is jurisdictional, (2) the venue rule that authorizes only the courts of appeals to entertain petitions is jurisdictional, and (3) the venue rule that directs some petitions for review to the D.C. Circuit and others to the local circuit court is not jurisdictional. These conclusions are buttressed by the goals and policies of the Clean Air Act, canons of statutory construction, bedrock civil procedure and administrative law principles, as well as sovereign immunity and core Article III concerns.

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Introduction	38
I. Jurisdictional and Non-Jurisdictional Provisions	42
A. Introduction	42
B. Subject-Matter Jurisdiction and Non-Jurisdictional Provisions.....	43
II. Clean Air Act Section 307(b)(1).....	44
A. Introduction	44
B. The Federal Clean Air Act and Section 307(b)(1)	44
C. The Case Law Addressing Clean Air Act Section 307(b)(1).....	47
1. The Supreme Court’s Cases Citing to Section 307(b)(1)	47
2. The Seventh Circuit’s Decision in <i>Clean Water Action</i> <i>Council of Northeastern Wisconsin, Inc. v. EPA</i>	48
3. The Tenth Circuit’s Decision in <i>Utah v. EPA</i>	51
4. The D.C. Circuit’s Opinions Analyzing Section 307(b)(1)	55
III. Analysis of Clean Air Act Section 307(b)(1)’s Filing Deadline and Venue Rules.....	58
A. Introduction	58
B. The Supreme Court’s Framework	59
C. Plain Language of Clean Air Act Section 307	60
D. Filing Deadline Requirement in Section 307(b)(1).....	61
1. The Text of the Filing Deadline Requirement in Section 307(b)(1)	61
2. The Context of the Filing Deadline Requirement.....	64
3. The Historical Treatment of Filing Deadlines	67
E. The Venue Rules in Section 307(b)(1).....	68
1. The Text of the Venue Rules in Section 307(b)(1).....	69
a. The Venue Rule with Respect to the Exclusive Jurisdiction of the Federal Courts of Appeals.....	69
b. The Venue Rule with Respect to the Proper Circuit Court of Appeals	70
2. The Context of the Venue Rule within the Clean Air Act.....	73
3. The Historical Treatment of Venue Rules	75
Conclusion.....	76

INTRODUCTION

The judicial review provisions in the Clean Air Act (CAA) are found in section 307(b)(1).¹ This section, first enacted in 1970, sets forth a series of requirements for judicial review of actions of the U.S. Environmental Protection Agency (EPA), including a sixty-day filing deadline and a venue requirement that not only mandates that petitions for review be filed in the courts of appeals, but further directs that certain petitions be heard in the U.S. Court of Appeals

1. 42 U.S.C. § 7607(b) (2012).

for the D.C. Circuit. There is a circuit split as to whether section 307(b)(1) and these requirements are jurisdictional.

And this characterization is far from academic. Jurisdictional statutory provisions implicate significant practical, doctrinal, and constitutional concerns. These issues include fairness, uniformity, and judicial efficiency, as well as fidelity to Article III of the U.S. Constitution and the sovereign immunity doctrine. As the Supreme Court recently declared, the characterization of “a rule as jurisdictional renders it unique in our adversarial system.”² Federal courts are, for the most part, cabined to adjudicating the parties’ claims.³ However, because federal courts have an independent duty to ensure that they act within the bounds of the jurisdiction granted by Congress and the U.S. Constitution, they must examine jurisdictional arguments either overlooked or not advanced by the parties.⁴ Thus, unlike non-jurisdictional rules, an objection to a court’s subject-matter jurisdiction can be raised at any time, even where a party has previously agreed that a tribunal has jurisdiction.⁵ After losing at trial, a party is therefore entitled to seek dismissal of the action based on a defect in subject-matter jurisdiction.⁶

The practical effects of this doctrine are easy to identify: “Tardy jurisdictional objections can therefore result in a waste of adjudicatory resources and can disturbingly disarm litigants.”⁷ If a party correctly identifies a defect in subject-matter jurisdiction, “many months of work on the part of the attorneys and the court may be wasted.”⁸ As one commentator quipped: “Horror stories abound of cases reversed after lengthy trials because of late-discovered defects” in subject-matter jurisdiction.⁹

Indeed, the seminal cases *Louisville & Nashville Railroad Co. v. Mottley*¹⁰ and *Owen Equipment & Erection Co. v. Kroger*,¹¹ taught in virtually every civil procedure class in this country, are prime examples of the harshness of requiring courts to address subject-matter jurisdiction at any stage in the proceeding.¹² In both cases, a higher court dismissed the case on appeal because the trial court had lacked jurisdiction, thereby negating the lower court’s decision on the merits.¹³ In fact, the same commentator mused whether the defendant in

2. *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817, 824 (2013).

3. *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1201 (2011) (citing *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356–57 (2006)).

4. *Id.* (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)).

5. *Sebelius*, 133 S. Ct. at 824.

6. *Shinseki*, 131 S. Ct. at 1202 (citing *Arbaugh*, 546 U.S. at 508).

7. *Sebelius*, 133 S. Ct. at 817 (citing *Shinseki*, 131 S. Ct. at 1197); *see also Arbaugh*, 546 U.S. at 514.

8. *Shinseki*, 131 S. Ct. at 1201.

9. Jessica Berch, *Waving Goodbye to Non-Waivability: The Case for Permitting Waiver of Statutory Subject-Matter Jurisdiction Defects*, 45 MCGEORGE L. REV. 635, 637 (2014).

10. 211 U.S. 149 (1908).

11. 437 U.S. 365 (1978).

12. Berch, *supra* note 9, at 651.

13. *Id.* at 637.

Kroger “knew it had a jurisdictional trump card and waited to play it [until] the case began to go badly for it, thereby supporting gamesmanship as a litigation strategy.”¹⁴

Moreover, the classification of a particular requirement as “jurisdictional” precludes courts from applying equitable doctrines, such as “good cause,” to excuse a defect in order to avoid unfair results.¹⁵ The doctrine’s inflexibility therefore prevents courts from using its traditional equitable power to waive the strict requirements of subject-matter jurisdiction in the appropriate circumstances.¹⁶

With these criticisms in mind, some commentators argue that certain requirements should instead be construed as non-jurisdictional “claim processing rules.” These “rules merely prescribe the method by which the jurisdiction granted the courts by Congress is to be exercised.”¹⁷ Unlike jurisdictional rules, these rules must be raised at particular times or are waived.¹⁸ Waivability promotes efficiency and fairness, and prevents the loss of precious judicial resources.¹⁹

There are, however, equally strong arguments why certain “claim processing” rules should retain jurisdictional attributes. The first point lies with the “core” attribute of federal subject-matter jurisdiction: Article III, section 2 of the U.S. Constitution. That section empowers Congress to establish the subject-matter jurisdiction of federal courts. It naturally follows that Congress “can also determine when, and under what conditions, federal courts can hear [cases].”²⁰

Basic goals of administrative law are also served by construing such requirements, like a filing deadline to challenge a regulation, as jurisdictional. For example, these deadlines serve “the important purpose of imparting finality into the administrative process.”²¹ This finality not only conserves administra-

14. *Id.* at 654. *Kroger* addressed whether the defendant’s principal place of business could be used for purposes of determining whether the parties were diverse. 437 U.S. at 369 n.5 (“The problem apparently was one of geography. Although the Missouri River generally marks the boundary between Iowa and Nebraska, Carter Lake, Iowa, where the accident occurred and where Owen had its main office, lies west of the river, adjacent to Omaha, Neb. Apparently the river once avulsed at one of its bends, cutting Carter Lake off from the rest of Iowa.”).

15. *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (finding that where a rule is jurisdictional, “[n]ot only could there be no equitable tolling,” but a “regulation providing for a good-cause extension” would also be invalid).

16. *See Berch*, *supra* note 9, at 654.

17. *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (citing 12 CHARLES WRIGHT, ARTHUR MILLER & RICHARD MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3141 (2d ed. 1997)).

18. *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011) (citing *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356–57 (2006)).

19. *Id.* (citing *Sanchez-Llamas*, 548 U.S. at 356–57) (“Jurisdictional rules may also result in the waste of judicial resources and may unfairly prejudice litigants. For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times.”).

20. *Bowles v. Russell*, 551 U.S. 205, 212 (2007) (citing *United States v. Curry*, 47 U.S. 106, 113 (1848)).

21. *Natural Res. Def. Council v. Nuclear Regulatory Comm’n*, 666 F.2d 595, 602 (D.C. Cir. 1981).

tive resources, but also protects “the reliance interests of regulatees who conform their conduct to the regulations.”²²

With these pros and cons in mind, the Supreme Court has attempted as a matter of doctrine “to bring some discipline to the use” of the term “jurisdiction” by the courts.²³ The Court has criticized lower courts for failing to appreciate “the distinction between two sometimes confused or conflated concepts: federal-court ‘subject-matter’ jurisdiction over a controversy; and the essential ingredients of a federal claim for relief,” such as claim-processing rules.²⁴ But the Court has created part of this confusion with its own imprecision. For example, it has described “a nonextendable time limit as ‘mandatory and jurisdictional,’”²⁵ but later clarified that some “time prescriptions, however emphatic, ‘are not properly typed ‘jurisdictional.’”²⁶

The Court has therefore cautioned that “even rules that are mandatory should not be called ‘jurisdictional’ unless they implicate the court’s very authority to adjudicate a case,” such as the limits imposed by subject-matter jurisdiction.²⁷ Thus, in order to determine whether a rule should be regarded as jurisdictional, the Court has developed a “readily administrable bright line” to assess the statutory limitation.²⁸ Absent this clarity, the Court has directed courts to construe the requirement as non-jurisdictional in character.²⁹ But the Court has warned that Congress needs not “incant magic words in order to speak clearly.”³⁰ Courts perform an analysis of congressional intent to determine whether a particular requirement should be jurisdictional.³¹ In the absence of definitive jurisdictional language, courts should analyze the legal character of the requirement, “as shown through [the requirement’s] text, context, and historical treatment.”³²

In other words, after analyzing the text of the requirement in question, including its legislative history, courts should look to how the provision operates

22. *Id.*

23. *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (citing *Shinseki*, 131 S. Ct. at 1202); *see also Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90 (1998) (noting that jurisdiction has been a “word of many, too many, meanings”).

24. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 503 (2006).

25. *Id.* at 510 (quoting *United States v. Robinson*, 361 U.S. 220, 229 (1960)).

26. *Id.*; *Scarborough v. Principi*, 541 U.S. 401, 414 (2004); *accord Eberhart v. United States*, 546 U.S. 12, 16–19 (2005); *Kontrick v. Ryan*, 540 U.S. 443, 454–55 (2004); *see also Carlisle v. United States*, 517 U.S. 416, 434–35 (1996) (Ginsburg, J., concurring).

27. *Shinseki*, 131 S. Ct. at 1202–03 (citing *Reed Elsevier, Inc. v. Muchnik*, 559 U.S. 154, 160–62 (2010)); *see also Kontrick*, 540 U.S. at 160.

28. *Sebelius*, 133 S. Ct. at 824 (quoting *Arbaugh*, 546 U.S. at 516).

29. *Id.* (citing *Arbaugh*, 546 U.S. at 515–16); *see also Gonzalez v. Thaler*, 132 S. Ct. 641, 648–49 (2012).

30. *Sebelius*, 133 S. Ct. at 824 (citing *Arbaugh*, 546 U.S. at 515–16).

31. *Shinseki*, 131 S. Ct. at 1204 (“[W]e attempt to ascertain Congress’ intent regarding the particular type of review at issue in this case.”).

32. *Utah v. EPA*, 765 F.3d 1257, 1257 (10th Cir. 2014) (citing *Reed Elsevier*, 559 U.S. at 166 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982))).

in the overall statutory scheme and how the Court has interpreted “similar provisions in many years past.”³³ These factors will be instructive of Congress’s intent to make a particular provision or statutory requirement implicate the subject-matter jurisdiction of the courts.³⁴

Accordingly, Part I of this Article distinguishes jurisdictional and non-jurisdictional requirements. Part II first gives a background of the CAA and section 307(b)(1) and then analyzes the recent Seventh and Tenth Circuit decisions, as well as decisions by the D.C. Circuit, to explain key views on whether the limitations are jurisdictional. Part III then applies recent Supreme Court guidance to analyze whether the filing deadline and venue rules in section 307(b)(1) are jurisdictional. It examines the text of the provision, its context, and its historical treatment. This Article concludes that: (1) the filing deadline requirement on judicial review is jurisdictional, (2) the venue rule that authorizes only the courts of appeals to entertain petitions is jurisdictional, and (3) the venue rule that directs some petitions for review to the D.C. Circuit and others to the local circuit court is not jurisdictional. These conclusions accord with the goals and structure of the CAA, canons of statutory construction, bedrock civil procedure and administrative law principles, as well as sovereign immunity and core Article III concerns.

I. JURISDICTIONAL AND NON-JURISDICTIONAL PROVISIONS

A. Introduction

What exactly does it mean for a provision (or requirement within a provision) to be “jurisdictional”? This Part provides a brief background of subject-matter jurisdiction and non-jurisdictional provisions, which although arguably “clear in theory . . . can be confusing in practice.”³⁵

Courts have “sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations.”³⁶ This mistake has been especially prevalent when characterization of that rule or requirement “was not central to the case, and thus did not require close analysis.”³⁷ Indeed, even the Supreme Court has admitted that it has generated confusion by the “less than meticulous” usage of the term “jurisdictional” in its cases.³⁸ And even where necessary to undertake this analysis, drawing this distinction can be especially difficult “because Congress is free to attach the conditions that go

33. *Sebelius*, 133 S. Ct. at 824 (citing *Reed Elsevier*, 559 U.S. at 168); see also John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133–34 (2008).

34. *Sebelius*, 133 S. Ct. at 824.

35. *Reed Elsevier*, 559 U.S. at 161.

36. *Id.* at 154 (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511–12 (2006) (citing examples)); see *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998) (citing examples).

37. *Reed Elsevier*, 559 U.S. at 154 (citing *Arbaugh*, 546 U.S. at 511–12).

38. *Eberhart v. United States*, 546 U.S. 12, 15 (2005) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004)).

with the jurisdictional label to a rule that [courts] would prefer to call a claim-processing rule.”³⁹

In the Court’s view, “[c]larity would be facilitated if courts and litigants used the label ‘jurisdictional’ not for claim-processing rules, but only for prescriptions” that are rooted in the courts’ adjudicatory authority, such as their subject-matter jurisdiction.⁴⁰ To advance this goal, the Court has endeavored in recent cases to restrict “drive-by jurisdictional rulings” that overlook the “critical differences between true jurisdictional conditions and nonjurisdictional limitations on causes of action.”⁴¹

B. Subject-Matter Jurisdiction and Non-Jurisdictional Provisions

“Jurisdiction” refers to “a court’s adjudicatory authority.”⁴² It is axiomatic that the federal courts are of limited jurisdiction: Article III, section 2 of the U.S. Constitution establishes the cases to which the judicial power extends.⁴³ Thus, properly applied, the term “jurisdictional” encompasses the “prescriptions delineating the classes of cases (subject-matter jurisdiction) . . . implicating that authority.”⁴⁴

Subject-matter jurisdiction, however, is not only established by the U.S. Constitution; it is also defined by Congress. As the Supreme Court has declared: “The notion of subject-matter jurisdiction obviously extends to classes of cases . . . falling within a court’s adjudicatory authority, but it is no less ‘jurisdictional’ when Congress prohibits federal courts from adjudicating an otherwise legitimate ‘class of cases’” by establishing requirements via statute.⁴⁵ Subject-matter jurisdiction is therefore both an Article III and a statutory requirement, and “no action of the parties can confer subject-matter jurisdiction upon a federal court.”⁴⁶ In other words, subject-matter jurisdiction, properly comprehended, denotes a court’s “power to hear a case,” which “can never be forfeited or waived.”⁴⁷ This is why an argument that subject-matter jurisdiction

39. *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011) (citing *Bowles v. Russell*, 551 U.S. 205, 212–13 (2007)).

40. *Kontrick*, 540 U.S. at 455.

41. *Reed Elsevier*, 559 U.S. at 161 (citations omitted) (quoting *Kontrick*, 540 U.S. at 456); *Steel Co.*, 523 U.S. at 91.

42. *Reed Elsevier*, 559 U.S. at 160 (quoting *Kontrick*, 540 U.S. at 455).

43. See U.S. CONST. art. III, § 2; *Gen. Motors Corp. v. EPA*, 363 F.3d 442, 448 (D.C. Cir. 2004) (“As a court of limited jurisdiction, we begin, and end, with examination of our jurisdiction.”).

44. *Reed Elsevier*, 559 U.S. at 160–61 (quoting *Kontrick*, 540 U.S. at 455); see also *Steel Co.*, 523 U.S. at 89 (“[S]ubject-matter jurisdiction . . . [refers to] the courts’ statutory or constitutional power to adjudicate the case.”).

45. *Bowles v. Russell*, 551 U.S. 205, 214 (2007) (quoting *Eberhart v. United States*, 546 U.S. 12, 16 (2005) (quoting *Kontrick*, 540 U.S. at 455)).

46. *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003) (quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)).

47. *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng’rs & Trainmen Gen. Comm.*, 558 U.S. 67, 81–82 (2009) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002))).

is lacking can be brought by any party, or by a court *sua sponte* at any time during the litigation, including after trial and the entry of judgment.⁴⁸

By contrast, Congress can also enforce “claim-processing rules” that do not “speak to the power of the court” but rather establish “the rights or obligations of the parties” when they are before a court.⁴⁹ Such rules are designed “to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.”⁵⁰ Although such rules are generally “unalterable on a party’s application,” they “can nonetheless be forfeited if the party asserting the rule waits too long to raise the point.”⁵¹ For example, if a party fails to assert that a rival’s complaint “fail[s] to state a claim upon which relief can be granted,” under Civil Procedure Rule 12(b)(6), it may not be asserted after trial.⁵² Similarly, venue rules and statutes of limitations can be waived in the absence of a timely argument.⁵³

II. CLEAN AIR ACT SECTION 307(b)(1)

A. Introduction

This Part provides a background of the Federal CAA and section 307(b)(1). It then analyzes recent Seventh, Tenth, and D.C. Circuit decisions to explain key views on whether the limitations in question are jurisdictional.

B. *The Federal Clean Air Act and Section 307(b)(1)*

In the 1970 CAA Amendments, Congress established “a comprehensive national program that made the States and the Federal Government partners in the struggle against air pollution.”⁵⁴ The CAA regulates air pollution by establishing air quality standards for certain pollutants and controlling the emissions of specified hazardous pollutants.⁵⁵ Congress vested EPA with the primary responsibility to administer the CAA. With respect to the review of EPA final action, the CAA establishes two methods of review. Section 307 governs

48. *Arbaugh*, 546 U.S. at 506; see FED. R. CIV. P. 12(b)(1), 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”).

49. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (“[J]urisdictional statutes ‘speak to the power of the court rather than to the rights or obligations of the parties.’” (quoting *Republic Nat’l Bank v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring))).

50. *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011) (citing *Union Pac. R.R. Co.*, 558 U.S. at 82–83).

51. *Eberhart v. United States*, 546 U.S. 12, 15 (2005) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004)).

52. *Arbaugh*, 546 U.S. at 506–07; see FED. R. CIV. P. 12(b)(6).

53. See FED. R. CIV. P. 12(h)(1) (specifying circumstances in which objections to improper venue and legal defenses, such as a statute of limitation, are waived).

54. *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990).

55. 42 U.S.C. §§ 7409, 7412 (2012).

“[a]dministrative proceedings and judicial review,” while section 304 authorizes “citizen suits” against EPA in district court.⁵⁶

At issue here is section 307(b), which addresses judicial review. Section 307(b)(1) contains five sentences, each of which serves a distinct function. The first sentence of section 307(b)(1) provides that a petition for review challenging specific actions, such as EPA’s promulgation of national ambient air quality standards (NAAQS) and standards of performance, “may be filed only in the United States Court of Appeals for the District of Columbia.”⁵⁷ Furthermore, it also specifies that “any other nationally applicable regulations promulgated, or final action taken” by EPA are included in the category of cases that must be filed in the D.C. Circuit.⁵⁸ This is one of the venue provisions at issue here.

The second sentence of section 307(b)(1) addresses judicial review of EPA actions that are “locally or regionally applicable.”⁵⁹ Such actions “may be filed only in the United States Court of Appeals for the appropriate circuit.”⁶⁰ The actions specified in this sentence include EPA’s approval of state implementation plans (SIPs), certain EPA orders, and enhanced monitoring and compliance certification programs.⁶¹ Like the preceding sentence, it also casts a wide net by specifying that “any other final action . . . which is locally or regionally applicable” must be filed in the appropriate circuit.⁶² Thus, the section

56. *Id.* §§ 7604, 7607.

57. The first sentence of CAA section 307(b)(1) states:

A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, [] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia.

§ 7607(b)(1).

58. *Id.*

59. The full sentence is:

A petition for review of the Administrator’s action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit.

Id.

60. *Id.*

61. *Id.*

62. *Id.*

requires review of covered EPA actions to be in the court of appeals rather than the district courts.

The third sentence qualifies the second sentence by requiring actions that EPA has determined have a “nationwide scope or effect” to be filed only in the D.C. Circuit.⁶³ However, EPA must make an affirmative finding and publish “that such action is based on such a determination.”⁶⁴ Thus, this sentence effectively allows EPA to redirect cases to the D.C. Circuit that might have otherwise been properly brought “locally or [in] regional” circuit courts.⁶⁵

The fourth sentence contains the filing deadline at issue here.⁶⁶ It provides:

Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.⁶⁷

Thus, the sentence establishes a filing deadline of sixty days, but allows petitions to be filed after the deadline if new “grounds” occur subsequent to the expiration of the period for judicial review.⁶⁸

The fifth and final sentence of the section makes clear that should a petition for reconsideration of a rule or action be filed with EPA, the filing of that petition for reconsideration does not: (1) affect finality of the rule or action for purposes of judicial review, (2) extend the filing deadline for a petition for review in the courts of appeals, and (3) postpone the effectiveness of the rule or action in question.⁶⁹

63. The third sentence states:

Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.

Id.

64. *Id.*

65. *Id.* EPA has argued that its finding is not subject to judicial review. *See* Am. Road & Transp. Builders Ass’n v. EPA, 705 F.3d 453, 456 (D.C. Cir. 2013) (“As an initial matter, EPA asserts that its decision whether to make such a finding is not judicially reviewable.”).

66. 42 U.S.C. § 7607(b)(1).

67. *Id.*

68. *Id.*

69. The last sentence reads:

The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

Id. Under other statutes, filing a petition for reconsideration with an agency effectively stays the rule or action in question and delays judicial review because courts express finality, mootness, and ripeness concerns.

C. *The Case Law Addressing Clean Air Act Section 307(b)(1)*

The Supreme Court has not directly addressed whether section 307(b)(1) or any of its specific limitations are jurisdictional. Several courts of appeals, however, have addressed whether section 307(b)'s timing deadline and venue rules are jurisdictional, but have reached opposite conclusions.⁷⁰ The Seventh Circuit, on one hand, recently held that the venue rules and filing deadline are not jurisdictional.⁷¹ The Tenth Circuit, on the other hand, also recently analyzed section 307(b)(1) and joined the D.C. Circuit in finding that the filing deadline is jurisdictional.⁷² The opinions in these cases offer a good starting point for analyzing the jurisdictional questions presented in Part III.

1. *The Supreme Court's Cases Citing to Section 307(b)(1)*

Although the Supreme Court has not directly analyzed section 307(b)(1), it has offered "drive-by jurisdictional rulings" on section 307 that do not have precedential effect.⁷³ Two such cases were decided last term. For example, in the first, *EPA v. EME Homer City Generation, L.P.*,⁷⁴ the Court concluded that a different subsection of CAA section 307 did not implicate the subject-matter jurisdiction of the courts.⁷⁵ In the second, *Utility Air Regulatory Group v. EPA*, the Court noted: "Numerous parties, including several States, filed petitions for review in the D.C. Circuit under 42 U.S.C. § 7607(b), challenging EPA's greenhouse-gas-related actions."⁷⁶

Earlier cases also cite to section 307(b)(1) as a source of jurisdiction. In *Alaska v. EPA*, the Court noted that "the Ninth Circuit concluded that it had adjudicatory authority pursuant to 42 U.S.C. § 7607(b)(1), which lodges jurisdiction over challenges to 'any . . . final [EPA] action' in the Courts of Appeals."⁷⁷ The Court observed in *Whitman v. American Trucking Ass'ns* that the respondents had "challenged the new standards in the Court of Appeals for the District of Columbia Circuit, pursuant to 42 U.S.C. § 7607(b)(1)."⁷⁸ And it also

70. See, e.g., *Utah v. EPA*, 765 F.3d 1257, 1258 (10th Cir. 2014) (finding that CAA section 307(b)(1)'s filing deadline is jurisdictional); *Clean Water Action Council of Ne. Wis. v. EPA*, 765 F.3d 749, 751 (7th Cir. 2014) (finding that CAA section 307(b)(1)'s venue and filing provisions are not jurisdictional).

71. *Clean Water Action Council*, 765 F.3d at 751.

72. *Utah*, 765 F.3d at 1258; *Okla. Dep't of Env'tl. Quality v. EPA*, 740 F.3d 185, 191 (D.C. Cir. 2014); *Med. Waste Inst. v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 459–60 (D.C. Cir. 1998).

73. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (citing *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996); *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994); *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 38 (1952)).

74. 134 S. Ct. 1584, 1602–03 (2014) (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013)).

75. *Id.*

76. 134 S. Ct. 2427, 2438 (2014).

77. *Alaska v. EPA*, 244 F.3d 748, 750–51 (9th Cir. 2004).

78. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 463 (2001).

addressed and rejected EPA's argument that the D.C. Circuit "lacked jurisdiction to review the EPA's implementation policy" because it was not final action and not ripe for review.⁷⁹ It specifically noted that section 307(b)(1) "gives the court jurisdiction over 'any . . . nationally applicable regulations promulgated, or final action taken, by the Administrator.'"⁸⁰

Finally, the Court cited section 307(b)(1) as jurisdictional in even older cases such as *Chevron v. Natural Resources Defense Council*, where "[r]espondents filed a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit pursuant to 42 U.S.C. § 7607(b)(1)."⁸¹ Likewise, the Court in *Harrison v. PPG Industries, Inc.* stated that "Congress . . . vested the courts of appeals with jurisdiction under [42 U.S.C. § 7607(b)(1)]."⁸²

These cases demonstrate that the Court believes, as a general matter, that section 307(b)(1) vests the courts of appeals with authority to hear challenges governed by section 307(b)(1). The Court, however, has not analyzed and definitively ruled whether the filing deadline and venue rules within section 307(b)(1) are jurisdictional.

2. *The Seventh Circuit's Decision in Clean Water Action Council of Northeastern Wisconsin, Inc. v. EPA*

In *Clean Water Action Council of Northeastern Wisconsin, Inc. v. EPA*, Judge Frank Easterbrook, writing for a unanimous panel of the U.S. Court of Appeals for the Seventh Circuit, ruled that the venue rules and filing deadline of CAA section 307(b)(1) were not jurisdictional.⁸³ The court explicitly recognized that both the Tenth and D.C. Circuits had reached the opposite conclusion.⁸⁴ In acknowledging that its decision created a conflict among the circuits, it circulated the opinion to all the circuit judges in regular active service, but none requested a hearing en banc.⁸⁵

At issue in *Clean Water Action Council* was Wisconsin's approval of Georgia-Pacific's application for the renewal of a CAA operating permit issued under Title V of the CAA for one of its paper mills.⁸⁶ Under Title V, certain stationary sources of air pollution must have an operating permit.⁸⁷ These per-

79. *Id.* at 477.

80. *Id.*

81. *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 841 (1984).

82. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593 (1980).

83. *Clean Water Action Council of Ne. Wis. v. EPA*, 765 F.3d 749, 751 (7th Cir. 2014).

84. *Id.* (noting that "[o]pinions from the Tenth and D.C. Circuits" supported the EPA's position that the petitioner had "brought the challenge belatedly and in the wrong circuit").

85. *Id.* at 753 (citing Circuit Rule 40(e)).

86. *Id.* at 751. *See generally* 42 U.S.C. §§ 7661–7661f (2012) (Title V).

87. § 7661a(a).

mits, which are mostly administered by states (but subject to EPA review), include applicable “pollution-control obligations” for such sources.⁸⁸

One of the “pollution-control obligations” specified in Georgia-Pacific’s permit is the maximum amount of “increments” (i.e., air pollution emissions) it may emit under Wisconsin’s SIP.⁸⁹ Created pursuant to the CAA, Wisconsin’s SIP is designed to ensure that the level of air pollution emitted within its borders is adequately controlled and allocated.⁹⁰ To that end, the CAA establishes a baseline pollution level, which includes pollution from sources in operation before 1975.⁹¹ It also sets a maximum “cap” above the baseline, called the state’s “allowance.”⁹² States, like Wisconsin here, then assign pollution “increments” to its sources, which when added together and to the baseline, must stay below the allowance.⁹³

While Georgia-Pacific’s Title V renewal permit for its paper mill was pending, the company sought and received permission to modify the same mill, which it had constructed before 1975.⁹⁴ After Wisconsin renewed the existing permit, the Clean Water Action Council petitioned EPA to intervene and object.⁹⁵ The Council argued that Wisconsin’s regulations and the regulations’ application to Georgia-Pacific violated the CAA.⁹⁶ Specifically, the Council argued that Georgia-Pacific’s pre-1975 emissions lost their “grandfathered” status when Georgia-Pacific modified its facility, and Wisconsin should have been required to count *all* the mill’s emissions as increments against its allowance.⁹⁷

EPA rejected the Council’s request, finding Wisconsin’s interpretation of the CAA consistent with its own understanding of the statute.⁹⁸ Under EPA’s interpretation, a modification to a pre-1975 facility does not convert the whole plant’s emissions into increments that must be counted against the state’s allowance.⁹⁹ Rather, only the increase in emissions caused by the modification should be used.¹⁰⁰ The Council then petitioned the Seventh Circuit under section 307(b) of the CAA for review of EPA’s order declining to object.¹⁰¹

88. See § 7661(4) (defining “permitting authority”); *Clean Water Action Council*, 765 F.3d at 750–51.

89. *Clean Water Action Council*, 765 F.3d at 750–51. See generally § 7410 (SIP provisions).

90. See *Clean Water Action Council*, 765 F.3d at 750 (explaining SIPs in general).

91. § 7479(4).

92. *Clean Water Action Council*, 765 F.3d at 750; see § 7410 (SIP provisions).

93. See *Clean Water Action Council*, 765 F.3d at 750.

94. See *id.* at 751.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* (citing Ga. Pac. Consumer Prods. LP Plant, 2012 EPA CAA Title V LEXIS 7).

99. *Id.*; see Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5})—Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC), 75 Fed. Reg. 64,864 (Oct. 20, 2010) (to be codified at 40 C.F.R. pts. 51, 52).

100. *Clean Water Action Council*, 765 F.3d at 751; see 75 Fed. Reg. at 64,864.

101. *Clean Water Action Council*, 765 F.3d at 751; see 42 U.S.C. § 7607(b) (2012).

The court first addressed EPA's argument that the court lacked jurisdiction.¹⁰² EPA argued that the Council's suit challenged EPA's 2010 regulations, which, as "nationally applicable regulations," could be challenged only in the D.C. Circuit and only within sixty days of publication.¹⁰³ EPA asserted that the court lacked the authority to hear the case "because the Council brought the challenge belatedly and in the wrong circuit."¹⁰⁴

Although the court recognized that decisions by the Tenth and D.C. Circuits supported EPA's argument, it found that these venue and filing requirements were not jurisdictional.¹⁰⁵ The court found that EPA had incorrectly applied the Supreme Court's case law on the difference between jurisdictional rules and claim-processing rules.¹⁰⁶ In the panel's view, rules establishing "venue" have "long been understood as non-jurisdictional."¹⁰⁷ Likewise, it asserted that the Supreme Court has found that most filing deadlines are viewed either as statutes of limitations or as claim-processing rules, and therefore not jurisdictional in nature.¹⁰⁸

The court then construed the Supreme Court's recent cases as requiring a "clear statement" or "clear indication" from Congress before the court could deem a particular prerequisite as jurisdictional.¹⁰⁹ After canvassing both the EPA and Georgia-Pacific briefs and the Tenth and D.C. Circuit opinions to find a clear statement from Congress, the Seventh Circuit concluded that no such statement could be found.¹¹⁰ It therefore held that the statute was not jurisdictional.¹¹¹

In its review of the other circuits' opinions, the Seventh Circuit focused on one case: *Natural Resources Defense Council v. Nuclear Regulatory Commission*.¹¹² There, the D.C. Circuit stated that filing deadlines serve "the important purpose of imparting finality into the administrative process."¹¹³ The D.C. Circuit noted that filing deadlines conserve administrative resources and protect

102. *Clean Water Action Council*, 765 F.3d at 751 ("Jurisdiction comes first.").

103. *Id.*; see 42 U.S.C. § 7607(b).

104. *Clean Water Action Council*, 765 F.3d at 751.

105. *Id.*

106. *Id.* (citing *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824–26 (2013); *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202–06 (2011); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160–66 (2010)).

107. *Id.* (citing *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979)).

108. *Id.* (citing *Sebelius*, 133 S. Ct. at 824–25 (listing cases)); see also *Shinseki*, 131 S. Ct. at 1203 ("Filing deadlines, such as the 120-day filing deadline at issue here, are quintessential claim-processing rules."); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510–16 (2006); *Eberhart v. United States*, 546 U.S. 12 (2005); *Kontrick v. Ryan*, 540 U.S. 443, 452–56 (2004).

109. *Clean Water Action Council*, 765 F.3d at 752 (quoting *Miller v. Fed. Deposit Ins. Corp.*, 738 F.3d 836, 844 (7th Cir. 2013)).

110. *Id.* at 753–54.

111. *Id.*

112. *Id.* at 751; see *Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981).

113. *Natural Res. Def. Council*, 666 F.2d at 602; see *Clean Water Action Council*, 765 F.3d at 751.

“the reliance interests of regulatees who conform their conduct to the regulations.”¹¹⁴

The *Clean Water Action Council* court, however, rejected this reasoning as a basis for finding filing deadlines jurisdictional.¹¹⁵ This reasoning, in the court’s view, simply explained why it makes sense to have filing deadlines, but not why such deadlines should be viewed as jurisdictional.¹¹⁶ It agreed that filing deadlines serve “valuable functions,” but asserted that the “beneficiaries” of such deadlines were capable of enforcing their rights.¹¹⁷ Thus, there was no need to categorize them as jurisdictional, thereby requiring the court to address such deadlines first—even where the parties had waived or forfeited these protections.¹¹⁸

Finally, the panel reasoned that Congress could have “framed the filing and venue rules in jurisdictional terms, but it did not.”¹¹⁹ It noted that the provision does not use the word “jurisdiction” and, in its view, CAA section 307(b) does not contain language that “is traditionally understood as jurisdictional.” Last, the court observed that the Supreme Court had not found the filing deadline in CAA section 307(b) to be jurisdictional.¹²⁰

3. *The Tenth Circuit’s Decision in Utah v. EPA*

The Tenth Circuit in *Utah v. EPA* recently reached the opposite conclusion when interpreting CAA section 307(b).¹²¹

At issue in the case was Utah’s submission of a SIP revision under the CAA’s regional haze program.¹²² Under the CAA, states must “prevent any future and remedy any existing man-made impairment of visibility” within their state.¹²³ EPA partially approved and partially disapproved the proposed revisions, which were published in the Federal Register on December 14, 2012.¹²⁴

Though not required when publishing a final rule, the EPA normally reminds parties that they must file petitions for review within sixty days of the publication and provides the corresponding deadline.¹²⁵ It did not do so here.

114. *Natural Res. Def. Council*, 666 F.2d at 602; see *Clean Water Action Council*, 765 F.3d at 752.

115. *Clean Water Action Council*, 765 F.3d at 752.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Utah ex rel. Utah Dep’t of Env’tl. Quality v. EPA*, 750 F.3d 1182, 1184 (10th Cir. 2014).

122. *Utah Dep’t of Env’tl. Quality*, 750 F.3d at 1184; Approval, Disapproval and Promulgation of State Implementation Plans; State of Utah; Regional Haze Rule Requirements for Mandatory Class I Areas under 40 CFR 51.309, 77 Fed. Reg. 74,355 (Dec. 14, 2012) (to be codified at 40 C.F.R. pt. 52); see also 42 U.S.C. § 7492 (2012) (CAA section 169B—regional haze provisions).

123. *Utah Dep’t of Env’tl. Quality*, 750 F.3d at 1184; 77 Fed. Reg. at 74,355.

124. *Utah Dep’t of Env’tl. Quality*, 750 F.3d at 1184; see also 77 Fed. Reg. at 74,355–56.

125. *Utah Dep’t of Env’tl. Quality*, 750 F.3d at 1185 (stating that the EPA typically alerts interested parties to the sixty-day deadline).

The EPA tried to correct the omission by publishing another statement in the Federal Register on January 22, 2013, extending the filing deadline for an extra month to March 25, 2013.¹²⁶ Following EPA's guidance, Utah and PacifiCorp (an affected company) filed petitions for review in the Tenth Circuit in mid-March 2013.¹²⁷

The court first noted that under CAA section 307(b) a petition for review must be filed within sixty days of the date that EPA's action is published in the Federal Register.¹²⁸ It then made clear that the "deadline is jurisdictional," citing the D.C. Circuit in *Oklahoma Department of Environmental Quality v. EPA*.¹²⁹ Looking only to the EPA's initial publication date of December 14, 2012 and the petitioners' filing date in mid-March 2013, the court declared that "the petitions would ordinarily be considered untimely."¹³⁰ Nevertheless, it proceeded to address the parties' arguments in support of jurisdiction.¹³¹

First, the court considered whether the sixty-day deadline was excused under CAA section 307(b)(1), which permits late filings for petitions "based solely on grounds arising" after sixty days.¹³² The court rejected the argument because the legal basis for the petitioners' claims (i.e., the "grounds" for the petitions)—the EPA action—was published on December 14, 2012.

Second, the court addressed whether the EPA's later correction in the Federal Register had changed the publication date from December 14, 2012 to January 22, 2013.¹³³ Using this date, petitioners argued that the filings were timely.¹³⁴ Petitioners pointed to an EPA regulation that instructed parties to use the date of publication in the Federal Register "[u]nless the Administrator otherwise explicitly provides in a particular promulgation, approval, or action."¹³⁵ They argued that by issuing the corrected notice, EPA had explicitly changed the promulgation date. The court, however, rejected this argument as a matter of law.¹³⁶ It noted that EPA had never explicitly stated that it was changing the promulgation date; rather, EPA merely purported to restart the sixty-day deadline by specifying a new deadline for judicial review on March 25, 2013.¹³⁷

126. *Id.*; see Approval, Disapproval and Promulgation of State Implementation Plans; State of Utah; Regional Haze Rule Requirements for Mandatory Class I Areas under 40 CFR 51.309, 78 Fed. Reg. 4341-01 (corrected Jan. 22, 2013) (to be codified at 40 C.F.R. pt. 52).

127. *Utah Dep't of Env'tl. Quality*, 750 F.3d at 1184; see also 77 Fed. Reg. at 74,355-56.

128. *Utah Dep't of Env'tl. Quality*, 750 F.3d at 1184 (citing 42 U.S.C. § 7607(b)(1) (2012)).

129. *Id.* (citing *Okl. Dep't of Env'tl. Quality v. EPA*, 740 F.3d 185, 191 (D.C. Cir. 2014)).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 1185; see Approval, Disapproval and Promulgation of State Implementation Plans; State of Utah; Regional Haze Rule Requirements for Mandatory Class I Areas under 40 CFR 51.309, 78 Fed. Reg. 4341-01 (corrected Jan. 22, 2013) (to be codified at 40 C.F.R. pt. 52).

134. *Utah Dep't of Env'tl. Quality*, 750 F.3d at 1184.

135. *Id.*

136. *Id.*

137. *Id.* at 1185; see 78 Fed. Reg. at 4341.

Third, the court considered whether to apply the “reopener doctrine,” first used by the D.C. Circuit to allow judicial review when an agency had “either explicitly or implicitly—undertaken to ‘reexamine its former choice.’”¹³⁸ The court observed that the Tenth Circuit had not yet adopted the doctrine and nonetheless decided that the doctrine would not apply.¹³⁹ The court held that though the EPA’s corrected notice had purported to extend the filing deadline, the EPA had not indicated that it would reexamine its rejection of the Utah plan.¹⁴⁰

Fourth and finally, the court made short work of the parties’ argument that it would be inequitable to dismiss the petitions.¹⁴¹ Although the court recognized the inequities in light of EPA’s corrected statement, the court believed that it was constrained; it simply could not expand its jurisdiction to avoid hardships.¹⁴²

Following the Tenth Circuit’s order on May 6, 2014, the *Utah* panel denied rehearing on September 3, 2014.¹⁴³ In that opinion, the panel expanded and refined the rationale for its conclusion that the filing deadline rule was jurisdictional.¹⁴⁴ It therefore “adhere[d] to the conclusion stated in the panel opinion: The deadline in § 7607(b)(1) is jurisdictional.”¹⁴⁵

The panel noted that filing deadlines can either be jurisdictional or non-jurisdictional.¹⁴⁶ In order to decide, the court looked to a “bright-line” rule that “focuses on Congress’s stated intention.”¹⁴⁷ Naturally, where Congress has clearly stated that a filing deadline is jurisdictional, the courts give effect to that intent.¹⁴⁸ But this intention, the panel found, can be demonstrated without the use of specific words.¹⁴⁹ Rather, the conclusion on whether Congress has been “clear” necessitates an analysis of the “legal character of the deadline, as shown through its text, context, and historical treatment.”¹⁵⁰ Applying this framework to CAA section 307(b)(1)’s text, context, and historical treatment, the court explored whether the sixty-day filing deadline was jurisdictional.¹⁵¹

138. *Utah Dep’t of Envtl. Quality*, 750 F.3d at 1186 (quoting *Nat’l Mining Ass’n v. U.S. Dep’t of Interior*, 70 F.3d 1345, 1351 (D.C. Cir. 1995) (quoting *Pub. Citizen v. Nuclear Regulatory Comm’n*, 901 F.2d 147, 151 (D.C. Cir. 1990))).

139. *Id.* at 1185–86.

140. *Id.* at 1186.

141. *Id.*

142. *Id.* (citing *Bowles v. Russell*, 551 U.S. 205, 213–14 (2007)).

143. *See Utah v. EPA*, 765 F.3d 1257 (10th Cir. 2014) (denying panel rehearing).

144. *Id.*

145. *Id.* at 1258.

146. *Id.*

147. *Id.* (citing *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817, 824 (2013)).

148. *Id.* at 1257.

149. *Id.*

150. *Id.* at 1258 (“[L]ooking to the condition’s text, context, and relevant historical treatment.” (citing *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010))).

151. *See id.* at 1257–64.

The panel proceeded to analyze the statutory text of CAA section 307(b)(1), as well as its legislative history, concluding that the text suggested that Congress intended the provision to be jurisdictional.¹⁵² It next looked at the context of the entire provision in the statutory scheme.¹⁵³ Because the section serves as a jurisdictional basis for courts, the panel found that it similarly supported its view that the filing deadline was jurisdictional.¹⁵⁴ The court then surveyed the historical treatment of the provision, including distinguishing recent Supreme Court cases that the parties argued had “overhauled” the historical treatment of filing deadlines as jurisdictional in nature.¹⁵⁵

The court also addressed other arguments presented by the petitions for rehearing by Utah and PacifiCorp.¹⁵⁶ It first rejected Utah’s argument that because EPA had subsequently informed the public that the petition for review could be filed by March 25, 2013, EPA’s reference to that date “bears a presumption of regularity.”¹⁵⁷ The court, however, found that even if that were true, EPA did not effectuate a change in the filing deadline through its publication of that date in its corrected notice.¹⁵⁸

Second, the court addressed a new argument by the parties that EPA had explicitly changed the date of the notice of its regulatory “action”— another ambiguous term found in EPA’s regulation establishing the publication in the Federal Register as the starting point for calculating a deadline.¹⁵⁹ But the panel found that this claim was merely a variation of the parties’ previous argument that EPA had explicitly changed the “promulgation” date through its correction notice on January 22, 2013.¹⁶⁰

Third, the panel addressed the parties’ related argument that EPA acted “explicitly” in setting the new deadline for filing petitions for review.¹⁶¹ The court reasoned that, even if true, it would not provide a basis for finding that EPA could change the filing deadline.¹⁶² The regulation relied on by the parties required EPA to explicitly change the notice date of its “promulgation” or “ac-

152. *See id.* at 1258–61 (reviewing statutory and legislative history of CAA section 307(b)).

153. *Id.* at 1260.

154. *Id.* (citing other Tenth Circuit panel decisions where the court stated it had jurisdiction under 42 U.S.C. § 7607(b)(1)) (“Without § 7607(b)(1), we would lack jurisdiction because the federal government would have enjoyed sovereign immunity in suits against the EPA.”).

155. *Id.* at 1261 (distinguishing *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197 (2011), from *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817 (2013), which had held that the filing deadlines in question were not jurisdictional).

156. *Id.* at 1262–63.

157. *Id.* at 1263.

158. *Id.* at 1262–63.

159. *Id.* at 1263 (quoting 40 C.F.R. § 23.3 (2014)) (“[The EPA’s] ‘promulgation, approval, or action’ is ordinarily considered filed when published in the Federal Register, but not when the EPA explicitly provides otherwise.”).

160. *See id.*

161. *Id.*

162. *Id.*

tion.”¹⁶³ Thus EPA’s explicit attempt to change the *filing deadline* did not conform to the regulation’s requirement that EPA explicitly change the *notice date of its promulgation or action*.¹⁶⁴ Last, it quickly rejected two arguments that the parties had raised previously.¹⁶⁵ The panel noted that the parties had not challenged the panel’s original rationale and therefore adhered to its original finding that deference to EPA’s interpretation of its regulation was not applicable and that the “reopener” doctrine would not apply.¹⁶⁶

4. *The D.C. Circuit’s Opinions Analyzing Section 307(b)(1)*

Because CAA section 307(b)(1) requires parties to file petitions for review in the D.C. Circuit for challenges to CAA final rules and actions of nationwide scope, the D.C. Circuit has had much more of an opportunity to hear petitions under section 307(b)(1) than other circuits.¹⁶⁷ But as Judge Easterbrook observed in *Clean Water Action Council of Northeastern Wisconsin, Inc. v. EPA*, many of these cases simply rely on past precedent without analyzing the precise issue presented here.¹⁶⁸ For example, in 2014, the D.C. Circuit in *Oklahoma Department of Environmental Quality v. EPA* first recited the requirement in CAA section 307(b) that “[a] petition for review of a final rule issued pursuant to the Clean Air Act must be filed within 60 days of the publication of that rule in the Federal Register.”¹⁶⁹ Then, quoting *Medical Waste Institute v. EPA*, a 2011 D.C. Circuit case, it stated that this requirement was “jurisdictional in nature,” with no further elaboration.¹⁷⁰

In turn, in *Medical Waste Institute v. EPA*, the court declined to reach the merits of one of petitioner’s challenges to an EPA regulation concerning certain waste incinerators.¹⁷¹ The court held that the claim was barred by CAA section 307(b)(1) because the “filing period” in the CAA “is jurisdictional in nature.”¹⁷² Thus, it found it was powerless to review the claim.¹⁷³ It simply cited the 1998 D.C. Circuit case *Motor & Equipment Manufacturers Ass’n v. Nichols*, without further elaboration.¹⁷⁴

163. *Id.*

164. *Id.*

165. *Id.* at 1264.

166. *Id.*

167. *See, e.g., Utah ex rel. Utah Dep’t of Env’tl. Quality v. EPA*, 750 F.3d 1182, 1184 (10th Cir. 2014); *Okla. Dep’t of Env’tl. Quality v. EPA*, 740 F.3d 185, 191 (D.C. Cir. 2014); *Med. Waste Inst. v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011); *Motor & Equip. Mfrs. Ass’n v. Nichols*, 142 F.3d 449, 459–60 (D.C. Cir. 1998).

168. *See Clean Water Action Council of Ne. Wis. v. EPA*, 765 F.3d 749, 751–52 (7th Cir. 2014).

169. *Okla. Dep’t of Env’tl. Quality*, 740 F.3d at 191 (citing 42 U.S.C. § 7607(b)(1) (2012)).

170. *Okla. Dep’t of Env’tl. Quality*, 740 F.3d at 191 (quoting *Med. Waste Inst.*, 645 F.3d at 427); *see* 42 U.S.C. § 7607(b)(1).

171. *Med. Waste Inst.*, 645 F.3d at 427.

172. *Id.* (quoting *Nichols*, 142 F.3d at 460).

173. *Id.*

174. *Id.*; *Nichols*, 142 F.3d at 460.

Next in the chain was *Motor & Equipment Manufacturers Ass'n v. Nichols*, where the D.C. Circuit reviewed EPA's actions with respect to California's automobile on-board emissions diagnostic device regulations, which were promulgated pursuant to California's authority under the CAA.¹⁷⁵ When addressing EPA's argument that some of the petitioners' challenges were untimely, the court parroted the familiar quote that the filing deadline in CAA section 307(b)(1) is "jurisdictional in nature, and may not be enlarged or altered by the courts."¹⁷⁶ But yet again the court merely quoted to earlier decisions of panels in the D.C. Circuit to support its holding.¹⁷⁷

One case that was cited by the court in *Motor & Equipment Manufacturers Ass'n v. Nichols* involved a petition for review filed under the Resource Conservation and Recovery Act—not the CAA.¹⁷⁸ In *Edison Electric Institute v. EPA*, the D.C. Circuit reviewed whether a challenge to an EPA statement concerning its enforcement policy of a particular Recovery Act provision was timely.¹⁷⁹ In that case, the court categorically found that filing periods, such as the Recovery Act's ninety-day filing window, were "jurisdictional in nature, and may not be enlarged or altered by the courts."¹⁸⁰ And like the aforementioned cases, it cited to an even older case to support its holding.¹⁸¹

Finally, at the end of the line, was the D.C. Circuit's 1981 decision in *Natural Resources Defense Council v. Nuclear Regulatory Commission*, where the court addressed a challenge subject to review under section 2344 of the Hobbs Act.¹⁸² The Nuclear Regulatory Commission argued that the Natural Resources Defense Council's claim was untimely.¹⁸³ The Natural Resources Defense Council argued that the Nuclear Regulatory Commission erred when it promulgated certain amendments to its regulations without following notice and comment procedures.¹⁸⁴ In ruling that the petition was untimely, the court concluded that the deadline "for seeking judicial review set forth in the Hobbs Act is jurisdictional in nature, and may not be enlarged or altered by the courts."¹⁸⁵

The D.C. Circuit explained that: "This time limit, like other similar limitations, serves the important purpose of imparting finality into the administrative process, thereby conserving administrative resources and protecting the reli-

175. *Nichols*, 142 F.3d at 452.

176. *Id.* at 460 (quoting *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 331 (D.C. Cir. 1993)).

177. *Id.*

178. *Edison Elec. Inst.*, 996 F.2d at 331.

179. *Id.* at 330–31; see Policy on Enforcement of RCRA Section 3004(J) Storage Prohibition at Facilities Generating Mixed Radioactive/Hazardous Wastes, 56 Fed. Reg. 42,730-01 (Aug. 29, 1991).

180. *Edison Elec. Inst.*, 996 F.2d at 331.

181. *Id.*

182. *Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 601 (D.C. Cir. 1981); see 28 U.S.C. § 2344 (2012).

183. *Natural Res. Def. Council*, 666 F.2d at 601.

184. *Id.* at 600–01.

185. *Id.* at 602.

ance interests of regulatees who conform their conduct to the regulations.”¹⁸⁶ Thus, these reasons supported the court’s finding that filing deadlines are jurisdictional.¹⁸⁷ But this case was not a CAA case, so the court did not reach its conclusion with respect to section 307(b)(1).

Beyond this line of cases, the D.C. Circuit has cited section 307(b)(1) a number of other times. In many of these cases, it has suggested without analysis that 307(b)(1) is a jurisdictional provision.¹⁸⁸ But it has also characterized section 307(b)(1) as containing venue rules. For example, in *American Road & Transportation Builders Ass’n v. EPA*, the court explained that section 307(b)(1) “establishes two routes by which venue may be appropriate in [the D.C. Circuit]. First, EPA’s regulations may themselves be nationally applicable. Second, and alternatively, EPA may determine that the otherwise locally or regionally applicable regulations have a nationwide scope or effect.”¹⁸⁹ Based on its finding that “venue is proper in the Ninth Circuit and not in [the D.C. Circuit],” the court dismissed the petition for review.¹⁹⁰

Likewise, the court in *Texas Municipal Power Agency v. EPA* concluded that section 307(b)(1) “is a matter of venue, not jurisdiction; [and] since EPA raised no objection, the provision is no bar to . . . review.”¹⁹¹ It found that the provision prescribes “the choice among circuits and not the power of a particular federal circuit court to hear a claim.”¹⁹² The court found support “by the provision’s reference to where a petitioner may ‘file,’ and by its unequivocal characterization in the legislative history as a venue provision.”¹⁹³ It concluded that section 307(b)(1) “refers to where a petitioner must file, and that the apparent congressional purpose was to place nationally significant decisions in the D.C. Circuit.”¹⁹⁴ And “[g]iven the less than clear language, the structure of the

186. *Id.*

187. *See also* *Env’tl. Def. v. EPA*, 467 F.3d 1329, 1330 (D.C. Cir. 2006) (“We do not have jurisdiction to review petitioners’ challenge to this set of regulations because the statutory period for judicial review has long since passed.”); *Sears, Roebuck & Co. v. EPA*, 543 F.2d 359, 361 (D.C. Cir. 1976) (“[Congress’s intent] in this jurisdictional enactment was clearly to compel timely petitions for review.”).

188. *See, e.g.*, *Natural Res. Def. Council v. EPA*, 777 F.3d 456, 463 (D.C. Cir. 2014) (“We have jurisdiction to hear the petition under 42 U.S.C. § 7607(b)(1).”); *Nat’l Env’tl. Dev. Ass’n’s Clean Air Project v. EPA*, 686 F.3d 803, 809 (D.C. Cir. 2012) (“We have jurisdiction to consider this challenge under CAA Section 307(b)(1), which provides that this Court has exclusive jurisdiction over petitions for review of national ambient air quality standards promulgated by the EPA Administrator.”); *Natural Res. Def. Council v. EPA*, 643 F.3d 311, 317 (D.C. Cir. 2011) (noting that petitioner had filed a petition for review pursuant to section 307(b)(1), “which gives this court exclusive jurisdiction over challenges to final EPA actions”); *Sierra Club v. EPA*, 356 F.3d 296, 300 (D.C. Cir. 2004) (stating that “Sierra Club now petitions for review of both actions pursuant to the jurisdictional grant of 42 U.S.C. § 7607(b)(1)”), *amended by* No. 03-1084, 2004 WL 877850 (D.C. Cir. Apr. 16, 2004).

189. *Am. Rd. & Transp. Builders Ass’n v. EPA*, 705 F.3d 453, 455 (D.C. Cir. 2013).

190. *Id.* at 456.

191. 89 F.3d 858, 862 (D.C. Cir. 1996).

192. *Id.* at 867.

193. *Id.* (citing H.R. REP. NO. 95-294, at 323–24 (1977)).

194. *Id.*

section—dividing cases among the circuits—and the legislative history indicate that § 307(b)(1) is framed more as a venue provision.”¹⁹⁵ Because of EPA’s failure to object, the court deemed the provision’s venue waived and found that the petitions for review were proper in the D.C. Circuit.¹⁹⁶

III. ANALYSIS OF CLEAN AIR ACT SECTION 307(b)(1)’S FILING DEADLINE AND VENUE RULES

A. Introduction

With this doctrinal, statutory, and case law background in mind, this Part assesses whether CAA section 307(b)’s filing deadline and venue requirements are jurisdictional.

First, though the Supreme Court has not definitively held, CAA case law indicates that section 307(b)(1) provides the basis for the courts of appeals’ subject-matter jurisdiction. As such, the Supreme Court might very well find that the venue rules and filing deadline within that provision should similarly be construed as jurisdictional limits. The Court’s views on this issue, however, have been merely “drive by” jurisdictional rulings. In light of the Court’s renewed interest in clarifying whether rules are jurisdictional or non-jurisdictional, these past rulings are far from conclusive.

Second, the courts of appeals are split on whether the rules within section 307(b) are jurisdictional. Although the D.C. Circuit should theoretically offer comprehensive and definitive views, its decisions have been less than clear. A survey of its cases suggests that the D.C. Circuit holds a categorical view that *all* filing deadlines are jurisdictional.¹⁹⁷ This sweeping view, however, is at odds with recent Supreme Court guidance. In that respect, the very recent analyses by the Tenth and Seventh Circuits may offer the most insight into how the courts of appeals should approach these pivotal inquiries.

Third, very recent cases by the Supreme Court have provided a consistent test for analyzing this issue. This test, as set forth below, asks if Congress has spoken clearly as to whether a particular rule is jurisdictional or not. After applying this test and framework, this Article concludes that although the filing deadline is jurisdictional, the venue rule directing some petitions for review to the D.C. Circuit and other petitions to the “local” circuit courts of appeals is not jurisdictional. The goals and structure of the CAA, canons of statutory construction, bedrock civil procedure and administrative law principles, as well as sovereign immunity and core Article III concerns, all support these conclusions.

195. *Id.*

196. *Id.*

197. *See, e.g.,* Edison Elec. Inst. v. EPA, 996 F.2d 326, 331 (D.C. Cir. 1993) (stating that filing deadlines, in general, are “jurisdictional in nature, and may not be enlarged or altered by the courts” (citation omitted)); *see also supra* note 188 and accompanying text.

B. The Supreme Court's Framework

The Supreme Court in the recent case *EPA v. EME Homer City Generation, L.P.* analyzed whether a different subsection of CAA section 307 implicated the subject-matter jurisdiction of the courts.¹⁹⁸ As a threshold issue, EPA argued that the petitioners had not raised their objections to a CAA regulation during the public comment period with “reasonable specificity.”¹⁹⁹ Relying on this statutory requirement found in CAA section 307(d), EPA asserted that the lower court therefore lacked jurisdiction to entertain those arguments.²⁰⁰ The Court, however, found that even if petitioners had not met this requirement for judicial review, it would not “regard that lapse as ‘jurisdictional.’”²⁰¹ It concluded with little elaboration that the requirement did not “speak to a court’s authority” and only spoke to “a party’s procedural obligations.”²⁰²

The holding was consistent with the Court’s recent apprehension regarding the use of the term “jurisdictional.” For example, in 2004, the Court in *Kontrick v. Ryan* declared that “[c]larity would be facilitated if courts and litigants used the label ‘jurisdictional’ not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.”²⁰³ Two years later, in *Arbaugh v. Y & H Corp.*, the Court decried that the word jurisdiction “is a word of many, too many, meanings.”²⁰⁴ It quipped that the “Court, no less than other courts, has sometimes been profligate in its use of the term.”²⁰⁵ Subsequent decisions further clarified that a rule may be “mandatory,” yet not “jurisdictional.”²⁰⁶

Thus, in order to determine whether a rule should be regarded as jurisdictional, the Court has developed a “readily administrable bright line” to assess whether to categorize a statutory limitation as jurisdictional.²⁰⁷ Unless such clarity is present, the Court has directed courts to construe the requirement as non-jurisdictional in nature.²⁰⁸ But the Court has warned that Congress need not “incant magic words in order to speak clearly.”²⁰⁹ Rather, courts are required to determine whether Congress intended a particular requirement to be

198. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1602–03 (2014).

199. *Id.* at 1602.

200. *Id.*

201. *Id.*

202. *Id.* at 1602–03 (citing *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)).

203. 540 U.S. at 455.

204. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90 (1998)).

205. *Id.*

206. *EME Homer City*, 134 S. Ct. at 1602–03 (quoting *Arbaugh*, 546 U.S. at 510).

207. *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (quoting *Arbaugh*, 546 U.S. at 516).

208. *Id.* (citing *Arbaugh*, 546 U.S. at 515–16); *see also* *Gonzalez v. Thaler*, 132 S. Ct. 641, 648–49 (2012).

209. *Sebelius*, 133 S. Ct. at 824.

jurisdictional.²¹⁰ To do this in the absence of specific language, courts should analyze the legal character of a requirement, “as shown through its text, context, and historical treatment.”²¹¹

In other words, after analyzing the language of the provision in question, including its legislative history, courts should look to how the provision operates in the overall statutory scheme, as well as the “Court’s interpretations of similar provisions in many years past.”²¹² This framework is therefore designed “to capture Congress’ likely intent and also provides helpful guidance for courts and litigants” to ascertain whether a rule is jurisdictional.²¹³

Here, the test therefore requires an analysis of the text and history of CAA section 307(b)(1), the context of this provision within the overall goals and structure of the CAA, and the Supreme Court’s past treatment of filing deadlines and venue rules with respect to whether they are jurisdictional.

C. Plain Language of Clean Air Act Section 307

Like any exercise in statutory construction, the starting place to divine congressional intent is the text of the statute.²¹⁴ In order to determine whether Congress intended the filing deadline and venues rules of section 307(b)(1) to be jurisdictional, the analysis begins with the plain language of section 307. Clearly, Congress did not explicitly label section 307 as a jurisdictional provision or indicate that the provision invoked the court’s “jurisdiction” or was “jurisdictional.”²¹⁵ Indeed, the section is titled “Administrative proceedings and judicial review,” and subsection (b) is titled “Judicial Review.”²¹⁶

This language stands in stark contrast to other provisions where Congress has called a provision “jurisdictional” or has used explicit language concerning jurisdiction. For example, Part IV of Title 28 of the United States Code (U.S.C.) covers “Jurisdiction and Venue.”²¹⁷ Likewise, Chapter 85 of Part IV is titled “District Courts; Jurisdiction.”²¹⁸ Congress has also labeled specific provisions as being jurisdictional in nature. For instance, 28 U.S.C. § 1295 is

210. *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011) (“[W]e attempt to ascertain Congress’ intent regarding the particular type of review at issue in this case.”).

211. *Utah v. EPA*, 765 F.3d 1257, 1258–59 (10th Cir. 2014) (“[L]ooking to the condition’s text, context, and relevant historical treatment.” (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010))).

212. *Sebelius*, 133 S. Ct. at 824 (citing *Reed Elsevier*, 559 U.S. at 168); *see also* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133–34 (2008).

213. *Shinseki*, 131 S. Ct. at 1203 (citing *Arbaugh*, 546 U.S. at 514–15 & n.11).

214. *See Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978) (“[T]he starting point in every case involving construction of a statute is the language itself.” (quoting *Santa Fe Indus. v. Green*, 430 U.S. 462, 472 (1977))).

215. 42 U.S.C. § 7607(b) (2012).

216. *Id.*

217. *See* 28 U.S.C. §§ 1251–1631 (2012) (Part IV).

218. *See* 18 U.S.C. §§ 1330–1369 (2012) (Chapter 85 of Part IV, titled “District Courts; Jurisdiction”).

named “Jurisdiction of the United States Court of Appeals for the Federal Circuit.”²¹⁹

Moreover, within the U.S.C. chapter addressing the courts of appeals, Congress used explicit language addressing jurisdiction.²²⁰ For instance, 28 U.S.C. § 1291 states that the courts of appeals (other than the Federal Circuit) “shall have jurisdiction of appeals from all final decisions” of the district courts (with limited exceptions).²²¹ Furthermore, the provision also specifies that the “jurisdiction of the United States Court of the Appeals for the Federal Circuit shall be limited to the jurisdiction” addressed in certain other sections within that chapter.²²² The various U.S.C. provisions addressing district courts are even clearer.²²³ Virtually every provision states that “[t]he district courts shall have original jurisdiction” and specifies the parameters of such jurisdiction.²²⁴

In sum, as a threshold matter, Congress’s denomination of section 307(b) as a judicial review provision, rather than a provision defining the courts’ jurisdiction, suggests that it did not intend the requirements of such section to be jurisdictional. But this conclusion does not end the inquiry. Even without using the “magic words” that CAA section 307 is a jurisdictional provision, it is still necessary to analyze the specific language that Congress used in the filing deadline and venue requirements in section 307(b)(1).²²⁵ Based on this analysis, and as supported by the context and historical treatment of section 307, Congress clearly intended the filing deadline and venue requirement that directs petitions for review to the courts of appeals to be jurisdictional, but the “choice of circuit” rule not to be jurisdictional.

D. Filing Deadline Requirement in Section 307(b)(1)

Based on the text and context of section 307(b)(1), as well as the historical treatment of filing deadline provisions similar to section 307(b)(1), Congress clearly intended section 307(b)(1)’s filing deadline requirement to be jurisdictional.

1. The Text of the Filing Deadline Requirement in Section 307(b)(1)

Section 307(b)(1)’s filing deadline requirement states petitions for review under the subsection “shall be filed within sixty days from the date” that the

219. 28 U.S.C. § 1295; *see also* § 1251 (Original Jurisdiction) (defining the matters over which the Supreme Court “shall have original and exclusive jurisdiction”).

220. 28 U.S.C. §§ 1291–1296 (Chapter 83 of Part IV).

221. 28 U.S.C. § 1291 (Final Decisions of District Courts).

222. *Id.*

223. 42 U.S.C. § 7607(b) (2012).

224. 28 U.S.C. §§ 1330–1369 (Chapter 84 of Part IV); *see, e.g.*, 28 U.S.C. §§ 1331 (Federal Question), 1332 (Diversity of Citizenship), 1333 (Admiralty, Maritime and Prize Cases), 1335 (Interpleader), 1337 (Commerce and Antitrust Regulations), 1338 (Patent), 1339 (Postal Matters), 1340 (Internal Revenue); *see also* 28 U.S.C. §§ 1334, 1346, 1350 (discussing jurisdictional requirements).

225. *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817, 824 (2013).

agency action is published in the Federal Register.²²⁶ The section also allows an extension beyond that deadline when a petition “is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.”²²⁷

Congress used jurisdictional terminology in the filing deadline requirement, such as “shall” and “petition for review.”²²⁸ These words have been regarded by the Supreme Court as carrying “jurisdictional import.”²²⁹ An example of this type of wording is found in Part 83 of Title 28 of the U.S.C., which sets forth various jurisdictional provisions applicable to the courts of appeals.²³⁰ Congress provided that “the United States Court of Appeals for the Federal Circuit *shall* have jurisdiction over a petition for review of a final decision” of certain agencies and required that a “petition for review under this section must be filed within 30 days after the date the petitioner receives notice of the final decision.”²³¹

But to assess whether the usage of these words in section 307(b) demonstrates Congress’s intent to make them jurisdictional requires a specific analysis of the enactment and subsequent amendments of that section. This analysis suggests that Congress did indeed intend the filing deadline in section 307(b)(1) to be jurisdictional.

The filing deadline requirement originated in the Senate version of the CAA and first appeared as a thirty-day deadline in 1970.²³² A 1970 Senate Report by the Committee on Public Works, which proposed the amendments, supports the view that Congress wanted the deadline to be jurisdictional. In establishing a Judicial Review section, the committee identified that the “availability or opportunity for judicial review of administratively developed and promulgated standards and regulations” was “[o]ne of the uncertainties in the existing Clean Air Act.”²³³ Furthermore, the committee was unclear the effect that such a judicial review would have on the “general program” of the CAA.²³⁴

The committee was concerned that “even in matters committed by statute to administrative discretion, preclusion of judicial review” requires clear congressional intent.²³⁵ The committee concluded that “precluding review does not appear to be warranted or desirable,” but that such review should be maintained

226. 42 U.S.C. § 7607(b)(1).

227. *Id.*

228. *Utah v. EPA*, 765 F.3d 1257, 1259 (10th Cir. 2014).

229. *Id.* (citing *Sebelius*, 133 S. Ct. at 825–26). In the Tenth Circuit’s view, Congress used this language because it intended the filing deadline to be jurisdictional. *Id.*

230. 28 U.S.C. § 1296 (2012).

231. *Id.* (emphasis added).

232. *See Utah*, 765 F.3d at 1259; *see also Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 660 (D.C. Cir. 1975) (discussing section 307).

233. S. REP. NO. 91-1196, at 40 (1970).

234. *Id.*

235. *Id.* at 40–41.

“within controlled time periods.”²³⁶ Therefore, it made clear: “In order to maintain the integrity of the time sequences provided throughout the Act, the bill would provide that any review sought must be filed within 30 days of the date of the challenged promulgation or approval.”²³⁷ The mandatory language used by the committee that petitions “must be filed” to ensure the time sequence of the CAA demonstrates that Congress intended the timing deadline to be jurisdictional.

Furthermore, the committee wanted to ensure that the filing of a petition for judicial review did “not operate as a stay of the application of the promulgation or decision for which review is sought unless the party seeking such review is able to demonstrate to the court that there is substantial likelihood that such party will prevail on the merits and that interests of the public will not be harmed by such stay.”²³⁸ This further underscores Congress’s jurisdictional intent, because Congress wanted all challenges to occur immediately so as not to delay the finality of the EPA regulation or final action.

When Congress proposed amendments to the CAA in the early to mid-1970s, it also expressed concerns that courts had recently suggested that filing deadlines found in statutory provisions similar to section 307(b) could be excused in certain circumstances.²³⁹ The House Committee on Interstate and Foreign Commerce cited the then-recent decision of *Investment Co. Institute v. Board of Governors*, where a panel of the D.C. Circuit, in dicta, suggested that if a party had “a legitimate excuse for not having brought his challenge within 30 days,” such party should not necessarily be precluded from bringing a case.²⁴⁰ In the committee’s view, “an undefined legitimate excuse” could allow “the statutory deadline (and the underlying policies of expedition and finality)” to be circumvented.²⁴¹

Although Congress ultimately expanded the time for petitions for review to be filed from thirty days to sixty days in the CAA Amendments of 1977, the committee repeated both its continued concern for strict adherence to the filing deadline and also explicitly stated that the filing deadline was jurisdictional:

236. *Id.* at 41.

237. *Sears, Roebuck & Co. v. EPA*, 543 F.2d 359, 361 (D.C. Cir. 1976) (citing S. REP. NO. 91-1196, at 41).

238. S. REP. NO. 91-1196, at 41. The current version of section 307(b)(1) retains this language. The final sentence of the section makes clear that the filing of a petition for reconsideration of a rule or action with the EPA does not (1) affect the finality of the rule or action for purposes of judicial review; (2) extend the filing deadline for a petition for review in the courts of appeals; nor (3) postpone the effectiveness of the rule or action in question. 42 U.S.C. § 7607(b)(1) (2012).

239. H.R. REP. NO. 95-294, at 322 (1977); *see also Utah v. EPA*, 765 F.3d 1257, 1259 (10th Cir. 2014) (quoting H.R. REP. NO. 95-294, at 322).

240. *Inv. Co. Inst. v. Bd. of Governors*, 551 F.2d 1270, 1281–82 (D.C. Cir. 1977) (dicta); H.R. REP. NO. 95-294, at 322.

241. H.R. REP. NO. 95-294, at 322; *see also Utah*, 765 F.3d at 1259 (quoting H.R. REP. NO. 95-294, at 322).

[T]he committee wishes to reaffirm its intent to strictly limit section 307 challenges to those which are actually filed within that time. The only instance in which the committee intends that later challenges may be entertained by the court of appeals are those in which the grounds arise solely after the 60th day.²⁴²

The committee made clear:

Thus, unless a petitioner can show that the basis for his challenge did not exist or was not reasonably to be anticipated before the expiration of 60 days, *the court of appeals is without jurisdiction* to consider a petition filed later than 60 days after the publication of the promulgated rule. The committee deems 60 days a legally adequate opportunity for judicial review.²⁴³

Congress's express desire to prevent courts from applying a "good cause" exception (beyond what was specifically provided for in the statute, i.e., new information) further supports that the section 307(b)(1) filing deadline is jurisdictional and thus not alterable by the courts.²⁴⁴

In sum, the text of section 307(b)(1) and its legislative history show that Congress intended to "strictly limit" judicial review to petitions filed within sixty days. The language of the legislative history, coupled with Congress's use of the word "shall" file a "petition for review," demonstrates that Congress clearly intended the filing deadline to be jurisdictional.

2. *The Context of the Filing Deadline Requirement*

The context of the filing deadline within the structure of the CAA, as well as related sovereign immunity principles, further reinforces the conclusion that Congress intended the filing deadline to be jurisdictional. Section 307(b)(1) provides the basis for jurisdiction in these types of challenges. Petitioners and the courts, including the Supreme Court, consistently identify the section as jurisdictional.²⁴⁵ Without section 307(b)(1) or a similar provision authorizing review of EPA action, courts could not entertain such lawsuits because EPA enjoys sovereign immunity.²⁴⁶

242. *Utah*, 765 F.3d at 1259–60 (citing H.R. REP. NO. 95-294, at 322).

243. *Id.*

244. 42 U.S.C. § 7607(b)(1) (2012) (allowing an untimely petition "if such petition is based solely on grounds arising after such sixtieth day").

245. *Utah*, 765 F.3d at 1260 n.1 ("In their opening briefs, PacifiCorp and Utah cited § 7607(b)(1) as a basis for jurisdiction."); *Oklahoma v. EPA*, 723 F.3d 1201, 1204 (10th Cir. 2013) (affirming the court's jurisdiction under section 7607(b)(1)); *Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1118 (10th Cir. 2009) (same); see also *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593 (1980) ("Congress . . . vested the courts of appeals with jurisdiction under [42 U.S.C. § 7607(b)(1)] . . .").

246. *Utah*, 765 F.3d at 1260 ("Suits against the EPA, as against any agency of the United States, are barred by sovereign immunity, unless there has been a specific waiver of that immunity." (citing *Sierra Club v. Whitman*, 268 F.3d 898, 901 (9th Cir. 2001))); see also *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994) (stating that sovereign immunity shields federal agencies from suit).

In general, federal courts “may not exercise jurisdiction absent a statutory basis” and “the United States is not amenable to suit in the federal courts absent an express waiver of sovereign immunity.”²⁴⁷ And because “[s]overeign immunity is jurisdictional in nature,” if “it has not been waived, sovereign immunity shields the federal government, its agencies, and federal officials acting in their official capacities from suit.”²⁴⁸

Here, however, Congress specifically authorized challenges in section 307(b)(1).²⁴⁹ When viewed in this light, section 307(b)(1) therefore constitutes a waiver of sovereign immunity.²⁵⁰ By extension, Congress’s establishment of a sixty-day window to file a petition for review constitutes a specific limitation on that waiver, and accordingly strict adherence to such deadline is also jurisdictional.²⁵¹ Courts have found that this is especially true where a particular restriction is “connected” to the grant of jurisdiction rather than “set off” from it.²⁵²

The interpretation that Congress intended section 307(b)(1)’s filing deadline to be jurisdictional based on its sovereign immunity implications dovetails with Congress’s concern for how section 307(b)(1) should operate with respect to the overall structure of the CAA. As discussed above, when Congress enacted the original version of section 307(b)(1), it wanted judicial review to be open only for a short time period “[i]n order to maintain the integrity of the time sequences provided throughout the Act.”²⁵³

In the original CAA, Congress established many aggressive and ambitious sequential deadlines. For example, in the 1970 Amendments, Congress charged EPA with the responsibility of establishing NAAQS for various air pollutants.²⁵⁴ After establishing NAAQS, EPA is required to promulgate designations of geographic areas across the nation according to their compliance with the NAAQS.²⁵⁵ Similarly, CAA section 112 requires EPA to designate pollutants “which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects” as “hazardous air pollu-

247. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005); *United States v. Mitchell*, 463 U.S. 206, 212 (1983); see *Friends of the Earth v. EPA*, 934 F. Supp. 2d 40, 45 (D.D.C. 2013).

248. *Friends of the Earth*, 934 F. Supp. 2d at 45 (quoting *Meyer*, 510 U.S. at 475), 46 (citing *Kentucky v. Graham*, 473 U.S. 159, 166–67 (1985) (suing federal officials in their official capacities)).

249. *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (“Congress has moreover authorized this type of challenge to EPA action. See 42 U.S.C. § 7607(b)(1).”).

250. *Utah*, 765 F.3d at 1260 (“Congress waived sovereign immunity through § 7607(b)(1).”).

251. *Id.* (“This jurisdictional junction suggests that the 60-day deadline is itself jurisdictional.”).

252. *Id.* at 1261 n.4 (“Contextually, the placement of a restriction within a statute is important. If the restriction is connected to a grant of jurisdiction, then the restriction is likely meant to qualify that grant; but if the restriction is ‘set off’ from the grant of jurisdiction, it may be non jurisdictional [sic].” (quoting *United States v. McGaughy*, 670 F.3d 1149, 1156 (10th Cir. 2012))).

253. *Sears, Roebuck & Co. v. EPA*, 543 F.2d 359, 361 (D.C. Cir. 1976) (citing S. REP. NO. 91-1196, at 41 (1970)).

254. 42 U.S.C. § 7409 (2012).

255. § 7407.

tants.”²⁵⁶ The EPA administrator was then required to promulgate standards for these pollutants.²⁵⁷

Thus, unlike cases where courts have found that leniency in a filing deadline is necessary to address a remedial purpose,²⁵⁸ such as in a case involving civil rights, strict adherence to the CAA filing deadline is both necessary and in the public interest to ensure that air pollution standards go into effect as soon as possible.²⁵⁹ The Seventh Circuit identified this concern when addressing a party’s attempt to file a challenge in the district courts under a different CAA provision: the court found that “[s]uch a collateral attack would evade the time period for reviewing the attainment date and cannot be countenanced.”²⁶⁰ The court explained that the filing deadline “is not arbitrary but is designed to get issues resolved promptly and thereby prevent delay in cleaning the air.”²⁶¹

Relatedly, if the filing deadline were construed to be non-jurisdictional, judicial review could be extended using equitable tolling principles or for good cause. This could result in air pollution programs being delayed past the standard period for seeking review, which could trigger a domino effect of delays through the rest of the steps or stages of the program at issue. Although Congress did provide that petitions could be filed beyond sixty days, it did so because it felt that it was important that regulations always take into account the latest information:

The committee recognizes that it would not be in the public interest to measure for all time the adequacy of a promulgation of any standard or regulation by the information available at the time of such promulgation. In the area of protection of public health and environmental quality, it is clear that new information will be developed and that such information may dictate a revision or modification of any promulgated standard or regulation established under the act. The judicial review section, therefore, provides that any person may challenge any promulgated implementation plan after the date of promulgation whenever it is alleged that significant new information has become available.²⁶²

256. See § 7412.

257. See *id.*

258. See, e.g., *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89 (1990) (addressing equitable tolling under the Civil Rights Act of 1964); *Bowen v. City of New York*, 476 U.S. 467, 479 (1986) (addressing equitable tolling under the Social Security Act); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392–93 (1982) (addressing equitable tolling under Title VII of the Civil Rights Act of 1964).

259. *Granite City Steel Co. v. EPA*, 501 F.2d 925, 926 (7th Cir. 1974).

260. *Id.*

261. *Id.*

262. *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 660 (D.C. Cir. 1975) (quoting S. REP. NO. 91-1196, at 41–42 (1970)); see also *Utah v. EPA*, 765 F.3d 1257, 1259 (10th Cir. 2014) (citing S. REP. NO. 91-1196, at 65–66) (“Congress recognized that if a petition was filed after 30 days, the court could consider the matter only if ‘significant new information [had] become available.’”).

Although the conferees subsequently “tightened up the grounds” to qualify under the exception in its present form, “solely on grounds arising after such 30th day,” the point remains the same.²⁶³ The administrative principle of finality is effectuated with an immutable filing deadline, but it is also in the public interest to provide for a narrow extension where there is new information. Thus, the context of section 307(b)(1) within the CAA demonstrates that Congress clearly intended the filing deadline to be jurisdictional.

3. *The Historical Treatment of Filing Deadlines*

An examination of the historical treatment of similar filing deadlines demonstrates that Congress clearly intended section 307(b)(1)’s deadline to be jurisdictional. The Supreme Court “has long held that the taking of an appeal within the prescribed time is ‘mandatory and jurisdictional.’”²⁶⁴ Likewise, the “courts of appeals routinely and uniformly dismiss untimely appeals for lack of jurisdiction.”²⁶⁵ Treatises similarly note that it “is well settled that failure to file a timely notice of appeal defeats the jurisdiction of a court of appeals.”²⁶⁶

Judicial review of administrative decisions has also been described as “mandatory and jurisdictional” such as in a case involving “the deadline for seeking review in the courts of appeals of final removal orders of the Board of Immigration Appeals.”²⁶⁷ Likewise, courts “have uniformly held that the Hobbs Act’s 60-day time limit for filing a petition for review of certain final agency decisions, 28 U.S.C. § 2344, is jurisdictional.”²⁶⁸

Recently, however, the Court rejected the categorical view that “every deadline for seeking judicial review in civil litigation is jurisdictional.”²⁶⁹ It clarified this conclusion in *Bowles v. Russell*, which “concerned an appeal from one court to another court” where there had been a “century’s worth of precedent and practice in American courts.”²⁷⁰ The Court has therefore distinguished

263. *Train*, 515 F.2d at 660.

264. *Bowles v. Russell*, 551 U.S. 205, 209–10 (2007) (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam)).

265. *Id.* at 210 (“[E]ven prior to the creation of the circuit courts of appeals, this Court regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction.”); *Scarborough v. Pargoud*, 108 U.S. 567, 568 (1883) (“[T]he writ of error in this case was not brought within the time limited by law, and we have consequently no jurisdiction.”).

266. 15A CHARLES WRIGHT, ARTHUR MILLER & EDWARD COOPER, FEDERAL PRACTICE AND PROCEDURE § 3901 (2d ed. 1992).

267. *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1204 (2011) (citing *Stone v. Immigration & Naturalization Serv.*, 514 U.S. 386, 406 (1995) (quoting *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990))).

268. *Id.* (“Government also notes that lower court decisions have uniformly held that the Hobbs Act’s 60-day time limit for filing a petition for review of certain final agency decisions, 28 U.S.C. § 2344, is jurisdictional.”).

269. *Id.* at 1203.

270. *Id.* (quoting *Bowles*, 551 U.S. at 209–10); see also *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng’rs & Trainmen Gen. Comm.*, 558 U.S. 67, 82 (2009) (“In contrast, relying on a long line of this

filing deadlines in other scenarios. As another example, the Court recently found that a deadline for appeals to the Court of Appeals for Veteran Claims was not jurisdictional.²⁷¹ Likewise, the Court has “treated the rule-based time limit for criminal cases differently, stating that it may be waived because ‘[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion.’”²⁷² It also declined to find a “filing deadline in a statutory section allowing service providers to obtain a hearing in the Provider Reimbursement Review Board” to be jurisdictional.²⁷³ In yet another case, the Court found that the timely filing of a U.S. Equal Employment Opportunity Commission charge was not a jurisdictional prerequisite to bringing a claim.²⁷⁴ It found that Congress intended the filing period to operate as a statute of limitations instead of a jurisdictional requirement.²⁷⁵

Despite these rulings, however, the text and context of the provisions at issue in those cases differ significantly from section 307(b)(1). For example, the differences have included: “the filing deadline was separated from the statutory language conferring jurisdiction;”²⁷⁶ the deadlines to appeal were “to an article I court, not an article III court”²⁷⁷ and to an administrative board,²⁷⁸ and “there was no suggestion of a long-standing practice of treating filing deadlines as jurisdictional in appeals to [an article III court].”²⁷⁹ All told, the text (and legislative history) of section 307(b), as well its context as a limited waiver of EPA’s sovereign immunity, show that Congress intended the filing deadline to be jurisdictional.

E. The Venue Rules in Section 307(b)(1)

A court’s subject-matter jurisdiction over an action is generally distinct from determining the proper venue in which an action could be filed.²⁸⁰ Subject-matter jurisdiction “addresses the power of the court to adjudicate,” while venue “addresses the place where that judicial authority may be exercised and

Court’s decisions left undisturbed by Congress, we have reaffirmed the jurisdictional character of the time limitation for filing a notice of appeal stated in 28 U.S.C. § 2107(a).”).

271. *Shinseki*, 131 S. Ct. at 1204–05.

272. *Bowles*, 551 U.S. at 212 (citing *Schacht v. United States*, 398 U.S. 58, 64 (1970)).

273. *Utah v. EPA*, 765 F.3d 1257, 1261 (10th Cir. 2014) (citing *Sebelius*, 133 S. Ct. at 822).

274. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

275. *Id.*

276. *Utah*, 765 F.3d at 1262 (citing *Shinseki*, 131 S. Ct. at 1205 (relying in part on Congress’s placement of the statutory language in a subchapter for “Procedure” rather than in the subsection for “Organization and Jurisdiction”).

277. *Id.* (citing *Shinseki*, 131 S. Ct. at 1204–05) (noting that the appeal went to the Court of Appeals for Veteran Claims).

278. *Id.* (Reimbursement Review Board).

279. *Id.* (citing *Shinseki*, 131 S. Ct. at 1204–05).

280. See *U.S. Int’l Trade Comm’n v. ASAT, Inc.*, 411 F.3d 245, 248 (D.C. Cir. 2005) (citing *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167–68 (1939)); WRIGHT, MILLER & COOPER, *supra* note 266, § 3801.

focuses on the convenience to the parties of the location of the lawsuit.”²⁸¹ As one court that interpreted section 307(b) noted: “[p]rovisions specifying where a suit shall be filed, as distinct from specifying what kind of court or other tribunal it shall be filed in, are generally considered to be specifying venue rather than jurisdiction.”²⁸²

But this does not mean that a venue rule within a provision cannot be jurisdictional in nature. “Congress is free to attach the conditions that go with the jurisdictional label to a rule that [courts] would prefer to call a claim-processing rule,” such as a venue requirement.²⁸³ Thus, the question remains whether Congress intended a “venue” rule within a jurisdictional provision to be jurisdictional.

As set forth below, it is clear that section 307(b)(1) is jurisdictional with respect to giving the courts of appeals exclusive jurisdiction to hear appeals from agency action under 307(b)(1). It is well settled that the provision divested the district courts of jurisdiction over CAA petitions for review of agency actions (through Congress’s use of “any action” in that provision).²⁸⁴ However, an analysis of the text, context, and historical treatment of section 307(b) demonstrates that the requirement that certain petitions must be filed in the D.C. Circuit or in local circuit courts is non-jurisdictional. But in any event, this distinction is blurred by a court’s ability to transfer cases to the correct circuit court either by using their inherent authority or under 28 U.S.C. § 1631.²⁸⁵

1. The Text of the Venue Rules in Section 307(b)(1)

Section 307(b)(1) establishes two distinct requirements as to the proper court in which to challenge agency action that is subject to review under CAA section 307(b). The text of the provision, as a whole, provides that the courts of appeals are the sole fora for petitions for review of EPA final actions under section 307(b)(1). Next, the component parts of section 307(b)(1) allocate certain petitions for review to the D.C. Circuit and others to the various “local” circuit courts. The commitment of petitions for review to the courts of appeals, rather than the district courts, is jurisdictional. The “choice of circuit” rule, however, is not.

a. The Venue Rule with Respect to the Exclusive Jurisdiction of the Federal Courts of Appeals

It is clear that section 307(b)(1) prevents district courts from hearing actions covered by that section. In the 1980 case *Harrison v. PPG Industries*,

281. *ASAT, Inc.*, 411 F.3d at 248 (citing *Neirbo Co.*, 308 U.S. at 167–68).

282. *New York v. EPA*, 133 F.3d 987, 990 (7th Cir. 1998).

283. *Shinseki*, 131 S. Ct. at 1203 (citing *Bowles v. Russell*, 551 U.S. 205, 212–13 (2007)).

284. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 584 (1980).

285. 28 U.S.C. § 1631 (2012).

Inc., the Supreme Court found that in the 1977 CAA Amendments, Congress had established the courts of appeals as the exclusive fora for filing petitions for review of agency actions covered by section 307(b)(1).²⁸⁶ In that case, the Court was called upon “to determine what Congress intended when it vested the courts of appeals with jurisdiction under § 307(b)(1) to review ‘any other final action.’”²⁸⁷

Prior to the Court’s decision there had been “conflicting views as to the proper interpretation of § 307(b)(1).”²⁸⁸ Before the CAA Amendments of 1977, section 307(b)(1) had established “exclusive review in an appropriate court of appeals of certain locally or regionally applicable actions of the Administrator under several specifically enumerated provisions of the Act.”²⁸⁹ Other actions that had not been specified in that section were proper in federal district court under federal question jurisdiction pursuant to 28 U.S.C. § 1331.²⁹⁰

During its 1977 overhaul of the CAA, Congress expanded locally or regionally applicable actions that were reviewable in the courts of appeals.²⁹¹ It added that “any other final action” was also reviewable by the courts of appeals under section 307(b)(1).²⁹² The Court held that by adding such language, Congress demonstrated that it did not want district courts to maintain jurisdiction previously proper using federal question jurisdiction under 28 U.S.C. § 1331.²⁹³ The Court also concluded that as policy matter, granting jurisdiction exclusively to the courts of appeals was “not wholly irrational.”²⁹⁴ Thus, there is no real dispute that this part of section 307(b)(1)’s venue rule is jurisdictional.

b. The Venue Rule with Respect to the Proper Circuit Court of Appeals

Section 307(b)(1) specifies two venue choices with respect to which court of appeals should entertain a petition for review.²⁹⁵ In the first part of that section, Congress directs that EPA final actions issued pursuant to certain specified sections, as well as “any other nationally applicable regulations promulgated, or

286. *Harrison*, 446 U.S. at 593–94. This is likely why many circuit courts cite section 307(b)(1) as the basis for their jurisdiction.

287. *Id.* at 593.

288. *Id.* at 584.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 584–85; *see also* Pub. L. No. 95-95, 91 Stat. 776 (1977) (CAA Amendments of 1977).

293. *See Harrison*, 446 U.S. at 584–94.

294. *Id.* at 593. The D.C. Circuit had also previously found that the district courts were without jurisdiction to hear appeals of CAA actions listed in section 307(b)(1). *See Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 660 (D.C. Cir. 1975) (“[O]ur reading of this court’s exclusive [s]ection 307 jurisdiction in this case necessarily ousts [d]istrict [c]ourt jurisdiction . . .”). Congress wanted “even and consistent national application” of national standards of performance by giving the courts of appeals exclusive jurisdiction to review such standards. S. REP. NO. 91-1196, at 41 (1970).

295. 42 U.S.C. § 7607(b)(1) (2012); *see also supra* notes 57, 59, 63 and accompanying text to review the complete text of this section.

final action taken” under the CAA “may be filed only” in the D.C. Circuit.²⁹⁶ In the next part of section 307(b)(1), Congress directs review of certain EPA actions (including the approval or disapproval of SIPs and specified regulations) that are “locally or regionally applicable” to be filed only in the court of appeals “for the appropriate circuit.”²⁹⁷ Congress also empowered EPA to direct actions to the D.C. Circuit if EPA’s action is “based on a determination of nationwide scope or effect,” provided that EPA “finds and publishes that such action is based on such a determination.”²⁹⁸

The question here is whether section 307(b)(1)’s delegation of certain petitions to the D.C. Circuit and other petitions to the “appropriate circuit” is jurisdictional. In other words, is the D.C. Circuit without jurisdiction to hear a petition concerning a “locally or regionally applicable” action? Similarly, does a circuit (other than the D.C. Circuit) have jurisdiction to hear a “nationally applicable” action? Relatedly, can there be a waiver of these requirements?

Although Congress did use mandatory language that petitions “may only be filed” in a particular circuit court of appeals, this language does not necessarily mean that Congress intended it to be jurisdictional. In fact, the explicit use of the term “venue” suggests that Congress wanted these requirements to work like typical venue provisions that could be subject to waiver, if not objected to, and also be eligible for transfer, if filed in the wrong court of appeals. Thus, the legislative history of the 1977 CAA Amendments that revised section 307(b)(1) demonstrates that Congress did not clearly intend to make these venue provisions jurisdictional.

In its report that accompanied its proposed CAA amendments, the House’s Interstate and Foreign Commerce Committee proposed changes to the administrative and judicial review provisions of the CAA.²⁹⁹ One of its proposals was “intended to clarify some questions relating to *venue* for review of rules or orders under the act.”³⁰⁰ The committee explained that its amendment to add the first sentence of section 307(b)(1) would make “it clear that any nationally applicable regulations promulgated by the Administrator under the Clean Air Act could be reviewed only in the U.S. Court of Appeals for the District of Columbia.”³⁰¹ Later, when explaining its proposal for actions “based on a determination of nationwide scope or effect,” the committee specifically stated that “ex-

296. § 7607(b)(1).

297. *Id.*

298. *Id.*

299. H.R. REP. NO. 95-294, at 318 (1977).

300. *Id.* at 322 (emphasis added); *see also* *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 590 (1980) (“[The committee] focused not on the jurisdictional question at issue here, but rather on the proper venue as between the District of Columbia Circuit and the other Federal Circuits.”).

301. H.R. REP. NO. 95-294, at 323.

clusive *venue* for review is in the U.S. Court of Appeals for the District of Columbia[.]”³⁰²

The House Committee also noted that in suggesting these particular amendments, it was “in large measure approving the portion of the Administrative Conference of the United States recommendation section 305.76-4(a), that deals with venue.”³⁰³ Congress created the Administrative Conference of the United States to “study the efficiency, adequacy and fairness of . . . administrative procedures.”³⁰⁴ Section 305.76-4 of the Conference report³⁰⁵ found that “Congress [had] enacted provisions for judicial review in the Clean Air Act and Federal Water Pollution Control Act (FWPCA) that [were] in some respects inconsistent, incomplete, ambiguous, and unsound.”³⁰⁶

The Conference noted that the FWPCA and CAA differed with respect to where challenges could be brought.³⁰⁷ The FWPCA allowed national standards to be reviewed in a circuit “in which a petitioner resides or transacts business.”³⁰⁸ On the other hand, most national CAA standards could only be reviewed in the D.C. Circuit.³⁰⁹ The Conference asserted that this “inconsistency in approach should be resolved” and that the FWPCA venue provision should be amended to correspond to the CAA provision.³¹⁰ Thus, in its “Recommendation” section, the Conference called for “Venue in the Court of Appeals,” which the House Committee specifically adopted.³¹¹

In sum, in proposing these amendments to section 307(b)(1), which were later adopted, the committee spoke in unmistakable language that it viewed section 307(b)(1)’s venue rule as merely a venue clause and not a jurisdictional rule.

302. *Id.* at 324 (emphasis added). In that respect, if each of the venue rules were jurisdictional, it would allow EPA to essentially “create” jurisdiction in the D.C. Circuit by designating an action as based on a determination of nationwide scope or effect. Arguably, it would be impermissible for EPA to do so because only Congress can create the jurisdiction of federal courts. *See* U.S. CONST. art. III, § 1; *Bowles v. Russell*, 551 U.S. 205, 217 (2007) (“Only Congress may determine a lower federal court’s subject-matter jurisdiction.” (quoting *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004))). *But see* S. REP. NO. 91-1196, at 41 (1970) (placing jurisdiction in “the U.S. Court of Appeals for the Circuit in which the affected air quality control region, or portion thereof, is located”).

303. H.R. REP. NO. 95-294, at 324.

304. Miscellaneous Amendments, 41 Fed. Reg. 56,767, 56,767 (Dec. 30, 1976) (to be codified at 1 C.F.R. pts. 305, 310).

305. The Conference report was titled “Judicial Review under the Clean Air Act and Federal Water Pollution Control Act (Recommendation No. 76-4).”

306. ADMIN. CONFERENCE OF THE U.S., JUDICIAL REVIEW UNDER THE CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT 1 (1976), available at <https://www.acus.gov/sites/default/files/documents/76-4-ss.pdf>.

307. *Id.* at 1–2.

308. *Id.* at 1.

309. *Id.*

310. *Id.* at 2.

311. *Id.* at 4; H.R. REP. NO. 95-294, at 324 (1977).

2. *The Context of the Venue Rule within the Clean Air Act*

Although the text of section 307(b)(1), when viewed in light of its legislative history, clearly demonstrates a lack of congressional intent to make the “choice of circuit” venue rule in section 307(b)(1) jurisdictional, the context of that rule in section 307(b)(1) further demonstrates that it is not jurisdictional. Congress also subsequently authorized courts to transfer petitions that were filed in the wrong circuit, which ensured that the venue rule remained, in effect, a non-jurisdictional provision, regardless of whether courts had interpreted the venue rule as being jurisdictional.

As courts have observed, when viewed in the context of section 307(b), the venue rule is more logically “read as prescribing the choice among circuits and not the power of a particular federal circuit court to hear a claim.”³¹² In other words, Congress intended the courts of appeals to hear petitions for review of EPA decisions under the CAA. By contrast, the “choice of circuit” rule here addresses *in which* circuit court a party must file. Although Congress clearly intended to have the D.C. Circuit be the location where nationally significant EPA actions be heard and allocated local cases to the regional circuit, it does not naturally follow that Congress intended to deny a different circuit the power to entertain such a petition.³¹³

The fact that Congress gave EPA the ability to direct certain petitions to the D.C. Circuit supports the conclusion that these rules are merely venue rules. If EPA makes an affirmative published finding that one of its actions is “based on a determination of nationwide scope or effect[,]” a petition may then only be filed in the D.C. Circuit.³¹⁴ EPA’s power to redirect cases to the D.C. Circuit, which EPA maintains is not subject to judicial review, demonstrates that Congress intended EPA to have a voice as to where proper venue should lie.³¹⁵ In other words, Congress empowered EPA to have *some* discretion in selecting venue, rather than requiring venue to be established only through a unilateral and mandatory statutory rule. Thus, it does not appear that Congress was so concerned about which circuit heard a petition that it wanted a petition filed in an incorrect circuit to be jurisdictionally deficient. Congress therefore likely viewed it as reasonable that EPA, like a typical defendant, would be subject to waiver if it failed to make a timely objection to a petition for review that was filed in an improper venue, rather than have an improperly filed petition be a defect that could be raised at any time during the litigation.

Moreover, Congress was likely aware that courts can transfer petitions that are filed in the wrong circuit using their inherent power to transfer cases “upon

312. *Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996).

313. *See id.*

314. 42 U.S.C. § 7607(b)(1) (2012).

315. *Id.*; *see Am. Rd. & Transp. Builders Ass’n v. EPA*, 705 F.3d 453, 456 (D.C. Cir. 2013) (“As an initial matter, EPA asserts that its decision whether to make such a finding is not judicially reviewable.”).

a finding that such transfer [is] in the interests of justice and in accord with sound principles of judicial administration.”³¹⁶ Indeed, in an unpublished opinion involving the venue rule in section 307(b)(1), the Fourth Circuit noted this ability.³¹⁷

Congress may have also been aware that courts were wrongly construing venue provisions, such as section 307(b)(1), as jurisdictional. In the Federal Courts Improvement Act of 1982, Congress “cured” these mistakes by enacting 28 U.S.C. § 1631, “Transfer to cure want of jurisdiction,” which would allow a court to transfer a case to either the D.C. Circuit or to a more appropriate circuit.³¹⁸ It provides:

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.³¹⁹

The legislative history of the Federal Courts Improvement Act of 1982 demonstrates that Congress recognized that because of “the complexity of the federal court system and of special jurisdictional provisions,” cases were being filed in the wrong court.³²⁰ And by the time such an error was discovered, “the statute of limitations or a filing period may have expired,” and parties had to incur additional costs “by having to file [a] case anew in the proper court.”³²¹ Congress specifically highlighted that this “problem has been particularly acute in the area of administrative law where misfilings and dual filings have become commonplace.”³²² Thus, in order to obviate “the wasteful and costly [protec-

316. *W. Va. Chamber of Commerce v. Browner*, No. 98-1013, 1998 U.S. App. LEXIS 37207, at *4 (4th Cir. Dec. 1, 1998).

317. *Id.* (listing cases in eight circuits, including the First, Fifth, Ninth, Tenth, and D.C. Circuits, that have held that courts of appeals have inherent power to transfer cases); *see, e.g.*, *Dornbusch v. Comm’r of Internal Revenue Serv.*, 860 F.2d 611, 614–15 (5th Cir. 1988); *Alexander v. Comm’r of Internal Revenue*, 825 F.2d 499, 501–02 (D.C. Cir. 1987); *Clark & Reid Co. v. United States*, 804 F.2d 3, 7 (1st Cir. 1986); *Pearce v. Office of Workers’ Comp. Programs*, 603 F.2d 763, 771 n.3 (9th Cir. 1979); *Panhandle E. Pipeline Co. v. Fed. Power Comm’n*, 337 F.2d 249, 252 (10th Cir. 1964).

318. 28 U.S.C. § 1631 (2012); *see Browner*, 1998 U.S. App. LEXIS 37207, at *4 (“If we were to find that we lacked subject matter jurisdiction, we could transfer the case to a court that did have subject matter jurisdiction (and venue) in the interests of justice pursuant to 28 U.S.C. § 1631.”).

319. § 1631.

320. S. REP. NO. 97-275, at 30 (1981).

321. *Id.*

322. *Id.* at 11; *see, e.g.*, *ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194, 1196 n.1 (10th Cir. 2011) (“A protective petition has been timely filed in the D.C. Circuit, thus eliminating any concern about the statute of limitations, and no argument has been made that any venue objection has been waived.”).

tive device] of filing in two or more courts at the same time,” a transfer statute was necessary to relieve the “burdens on the courts as well as on the parties.”³²³

Under this provision, a circuit court with an otherwise valid petition for review (such as one that was filed within the filing deadline) could transfer the case to a court with proper venue if the court finds it is “in the interest of justice” to do so.³²⁴ Given Congress’s intention that it is important to give parties the ability to seek judicial review under the CAA, it seems clear that cases would be transferred to the correct circuit court under either method. Indeed, one circuit court, after concluding that proper venue lay in the D.C. Circuit, found that it was “in the interests of justice and in accord with principles of sound judicial administration to transfer [the] case to the D.C. Circuit”³²⁵ because if it had dismissed the case the petitioner would have run afoul of the filing deadline of section 307(b)(1) when it attempted to refile the case in the proper venue.

Finally, the same sovereign immunity concerns outlined above, which support a conclusion that the filing deadline is jurisdictional, are not present when determining whether the venue rule is jurisdictional. Because Congress provided a limited waiver of sovereign immunity for EPA final actions to be challenged in the courts of appeals, there is little difference as to whether EPA has to defend its action in the D.C. Circuit or another circuit court. Without a clear indication that Congress wished the choice of circuit to be an essential element of the waiver, the requirement is more logically viewed as a traditional venue rule.

3. *The Historical Treatment of Venue Rules*

The historical treatment of similar rules reinforces the conclusion that the section 307(b)(1) circuit selection venue rule is not jurisdictional. In short, “venue rules have long been understood as non-jurisdictional” and can be waived.³²⁶ As one court explained: “[i]t would be usurpative for a federal court

323. S. REP. NO. 97-275, at 11. Importantly, it specified that the transferee court should use the date that the petition was filed in the wrong circuit. 28 U.S.C. § 1631. The Senate Report stated, “The case would be treated by the transferee court as though it had been initially filed there on the date to pay any additional filing fees. This provision is broadly drafted to allow transfer between any two federal courts.” S. REP. NO. 97-275, at 30.

324. 28 U.S.C. § 1631.

325. *W. Va. Chamber of Commerce v. Browner*, No. 98-1013, 1998 U.S. App. LEXIS 37207, at *8 (4th Cir. Dec. 1, 1998); *see also ATK Launch Sys.*, 651 F.3d at 1196 n.1 (“This court has the power to transfer the case either way.”).

326. *Clean Water Action Council of Ne. Wis., Inc. v. EPA*, 765 F.3d 749, 751 (7th Cir. 2014) (citing *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979)); *see Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011) (“When ‘a long line of this Court’s decisions left undisturbed by Congress’ has treated a similar requirement as ‘jurisdictional,’ we will presume that Congress intended to follow that course.” (quoting *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng’rs & Trainmen Gen. Comm.*, 558 U.S. 67, 82 (2009))); *WRIGHT, MILLER & COOPER, supra* note 266, § 3829.

to assert jurisdiction over a case that the Constitution or statute had consigned to a state court, or even for a federal district court to assert jurisdiction over a case that should have been brought in a federal court of appeals”³²⁷ However, it reasoned that “it is not usurpative for one federal court of appeals to assert jurisdiction (because of absence of objection) over a case that it would have been authorized to adjudicate if only the effects of the order sought to be reviewed had been felt in one part of the country rather than another.”³²⁸

Furthermore, Congress knows how to give a venue provision the stature of a jurisdictional limitation, including specifying that a particular court (as a matter of venue) has jurisdiction. For example, in 28 U.S.C. § 1365, Congress provided that “[t]he United States District Court for the District of Columbia shall have original jurisdiction, without regard to the amount in controversy, over any civil action” brought by the Senate with respect to certain matters.³²⁹ The venue requirement within this provision is inextricably linked with the federal district court of the District of Columbia’s subject-matter jurisdiction to hear specified cases. No such specificity exists in section 307(b)(1) to conclude that Congress clearly intended the delegation of certain cases to specific courts of appeals to be jurisdictional.

CONCLUSION

It is clear that Congress intended section 307(b)(1)’s filing deadline to be jurisdictional. Consistent with the U.S. Constitution, it is up to Congress to determine the jurisdiction of the federal courts.³³⁰ The power to “also determine when, and under what conditions” the federal courts exercise this jurisdiction follows *a fortiori* from this power.³³¹ Although it is tempting to characterize filing deadlines as claim-processing rules, “it is no less ‘jurisdictional’ when Congress prohibits federal courts from adjudicating an otherwise legitimate ‘class of cases’ after a certain period has elapsed from final judgment.”³³² And it makes sense to do so. Basic goals of administrative law are served by construing such requirements, such as a filing deadline to challenge regulations, as jurisdictional. For example, such rules serve “the important purpose of imparting finality into the administrative process.”³³³ This not only conserves administrative resources, but also protects “the reliance interests” of parties that conform to regulation.³³⁴

327. *New York v. EPA*, 133 F.3d 987, 990 (7th Cir. 1998) (citing *Missouri v. United States*, 109 F.3d 440 (8th Cir. 1997)).

328. *Id.*

329. 28 U.S.C. § 1365(a).

330. *Bowles v. Russell*, 551 U.S. 205, 212 (2007).

331. *Id.* at 212–13 (citing *United States v. Curry*, 47 U.S. 106, 113 (1848)).

332. *Id.* at 213.

333. *Natural Res. Def. Council v. Nuclear Regulatory Comm’n*, 666 F.2d 595, 602 (D.C. Cir. 1981).

334. *Id.*

It is also equally clear that the “choice of circuit” rule in section 307(b)(1) is not jurisdictional. Rather, it is an ordinary venue provision that can be waived. The legislative history of this provision explicitly demonstrates Congress’s clear intent that these venue rules be regarded as non-jurisdictional. And although subject to waiver by EPA, cases not filed in the appropriate circuit can nonetheless find their way back to the circuit that Congress prescribed through either 28 U.S.C. § 1631 or through the courts’ inherent power to transfer cases. In the end, this fosters Congress’s goal of having cases heard in its preferred forum without the ill effects of characterizing a rule as “jurisdictional.”

